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United States Court of Appeals,
Fourth Circuit.

EAST TENNESSEE NATURAL GAS COMPANY, Plaintiff-Appellee,
v.
John F. SAGE; Linda K. Sage, Defendants-Appellants,
and
1.20 Acres in Wythe County, Virginia; Mary Casel, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company, Plaintiff-Appellee,
v.
Margaret Clanton, Defendant-Appellant,
and
.28 Acres in Henry County, Virginia; Lucy Clark, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company, Plaintiff-Appellee,
v.
Scott A. Fontaine; Lillie M. Fontaine, Defendants-Appellants,
and
2.09 Acres in Henry County, Virginia; Lucy Clark, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company, Plaintiff Appellee,
v.
Alva Holland, Defendant-Appellant,
.54 Acres in Henry County, Virginia; Janet M. Holland; Lucy Clark, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.

3 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Maynard R. Joyce, Defendant-Appellant,
and
2.26 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Ervin L. Frazier, Jr., Defendant-Appellant,
and
1.02 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Barbara G. Vass; Dossie G.V. Hall, a/k/a Dossie Shockley Vass, Defendants-Appellants,
and
1.59 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe; Unknown Owners, Defendants.
5 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Layton Russell Hancock; John Wendell Hancock; Sonia Lucille Easter; Una Faye Saunders; Wayne Dwight Hancock; Heirs of Royal Early Hancock, Defendants-Appellants,
and
2.57 Acres in Carroll County, Virginia; John Doe, et al.; Unknown Owners;

Josephine H. Powers; Rudolph Hancock; Alene Sumner; James F. Hancock;
Talford Clay Hancock; Thomas Kenneth Hancock;
Averette Early Hancock; Jane
A. Harrison, County Assessor, Defendants.
6 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
H. Wade Baker; Lola W. Baker,
Defendants-Appellants,
and
1.91 Acres in Carroll County, Virginia; John Doe, et al.; Unknown Owners;
Jane A. Harrison, County Assessor, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Gregory L. Seibert, Defendant-Appellant,
and
.45 Acres in Carroll County, Virginia; Jane A. Harrison; John Doe, et al.;
Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff Appellee,
v.
Robin Marie Seibert; Gregory L. Seibert,
Defendants-Appellants,
and
.61 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
8 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Helen E. Melton; Charlotte A. Edwards,
Defendants-Appellants,
and

Jane A. Harrison, County Assessor; John Doe, et al.; Unknown Owners; 4.76 Acres in Carroll County, Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Ralph D. Howell; Mabel Fulcher,
Defendants-Appellants,
and
Rose C. Howell; John Doe, et al.; C. Jerry Love, Commissioner of Revenue; Unknown Owners; 3.18 Acres in Patrick County, Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Melvin A. Thomas, Defendant-Appellant,
and
1.40 Acres in Patrick County, Virginia; John Doe, et al.; C. Jerry Love, Commissioner of Revenue; Unknown Owners, Defendants.
10 East Tennessee Natural Gas Company,
Plaintiff Appellee,
v.
John M. Lewis; Cornelia A. Lewis,
Defendants-Appellants,
and
C. Jerry Love, Commissioner of Revenue; John Doe, et al.; Unknown Owners; .
37 Acres in Patrick County, Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Earl R. Potter; Joan A. Potter,
Defendants-Appellants,
and

C. Jerry Love, Commissioner of Revenue; John Doe, et al.; Unknown Owners; .
60 Acres in Patrick County, Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Jerry S. Thomas; Betty B. Thomas,
Defendants-Appellants,
and
3.04 Acres in Patrick County, Virginia; John Doe, et al.; Unknown Owners; C.
Jerry Love, Commissioner of Revenue, Defendants.
12 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
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Nancy U. Stanley, Defendant-Appellant,
and
3.62 Acres in Patrick County, Virginia; C. Jerry Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
13 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Otra Martin; Edna Lou Martin Smart; Ellen M. Fulcher; Harvey Glenn Fulcher,
Defendants-Appellants,
and
3.81 Acres in Patrick County, Virginia; C. Jerry Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
14 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Robert E. Meadows; Marion C. Meadows,
Defendants-Appellants,

and

.94 Acres in Patrick County, Virginia; C. Jerry Love, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.

15 East Tennessee Natural Gas Company, Plaintiff-Appellee,

v.

William Troy Strickland; Susan M. Strickland, Defendants-Appellants,

and

1.13 Acres in Patrick County, Virginia; C. Jerry Love, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.

16 East Tennessee Natural Gas Company, Plaintiff-Appellee,

v.

James A. Keesee; Joanne Richmond Keesee, Defendants-Appellants,

and

1.58 Acres in Patrick County, Virginia; C. Jerry Love, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.

17 East Tennessee Natural Gas Company, Plaintiff-Appellee,

v.

Thomas C. Williams, Jr.; Jeannie B. Williams, Defendants-Appellants,

and

3.27 Acres in Wythe County, Virginia; Mary Casel, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.

18 East Tennessee Natural Gas Company, Plaintiff-Appellee,

v.

Anissa J. Brady, a/k/a Anissa Holland,
Defendant-Appellant,
and
.65 Acres in Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Charles K. Webb; Lena Webb,
Defendants-Appellants,
and
.64 Acres in Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Calvin Hugh Webb; Linvol Oscar Webb; Wendell
Wayne Webb, Defendants-
Appellants,
and
3.38 Acres in Carroll County, Virginia; John Doe,
et al.; Jane A. Harrison,
County Assessor; Unknown Owners, Defendants.
20 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Alva Jackson Horton; Heath Webb,
Defendants-Appellants,
and
1.60 Acres in Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
21 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.

George Lewis Webb; Edward Paul Webb; Roger Lee Webb; Joel Ray Webb,
Defendants-Appellants,
and
.30 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
22 East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Dorothea W. Bryant, Defendant-Appellant,
and
1.23 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Clyde Holland; Shirley Holland,
Defendants-Appellants,
and
5.2 Acres in Henry County, Virginia; Lucy Clark, Commissioner of Revenue;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
L.J. Rector; Charis Jean Rector; Johnny J. Rector; Joe Rector, Defendants-
Appellants,
and
3.98 Acres in Smyth County, Virginia; Richard Walker, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
24 East Tennessee Natural Gas Company,
Plaintiff-Appellee,

v.

Fred Tolley; Guida Tolley, Defendants-Appellants,

and

4.0 Acres in Wythe County, Virginia; Mary Casel, Commissioner of Revenue;

John Doe, et al.; Unknown Owners, Defendants.

East Tennessee Natural Gas Company,

Plaintiff-Appellee,

v.

James Fogelsong; Glen Stuart Fogelsong,

Defendants-Appellants,

and

2.64 Acres in Wythe County, Virginia; Mary Casel, Commissioner of Revenue;

John Doe, et al.; Unknown Owners, Defendants.

East Tennessee Natural Gas Company,

Plaintiff-Appellee,

v.

Weaver Enterprises, Incorporated,

Defendant-Appellant,

and

11.42 Acres in Wythe County, Virginia; Mary Casel, Commissioner of Revenue;

John Doe, et al.; Unknown Owners, Defendants.

26 East Tennessee Natural Gas Company,

Plaintiff-Appellee,

v.

Ronnie Lynn Goforth; Susan D. Goforth;

and

3.5 Acres/Wythe County, Virginia; Mary Casel, Commissioner of Revenue; John

Doe, et al.; Unknown Owners, Defendants.

No. 03-1708 No. 03-1709 No. 03-1710
No. 03-1711 No. 03-1712 No. 03-1713
No. 03-1714 No. 03-1715 No. 03-1716
No. 03-1717 No. 03-1718 No. 03-1719
No. 03-1720 No. 03-1721 No. 03-1722
No. 03-1723 No. 03-1724 No. 03-1725
No. 03-1726 No. 03-1727 No. 03-1728
No. 03-1729 No. 03-1730 No. 03-1731
No. 03-1732 No. 03-1733 No. 03-1734
No. 03-1735 No. 03-1736 No. 03-1737
No. 03-1738 No. 03-1739 No. 03-1740
No. 03-1741 No. 03-1797.

Argued: Sept. 25, 2003.
Decided March 22, 2004.
[ENTERED: March 22, 2004]

ARGUED: Joseph Thomas Waldo, Waldo & Lyle, P.C., Norfolk, Virginia; William B. Hopkins, Jr., Martin, Hopkins & Lemon, P.C., Roanoke, Virginia; Gary Michael Bowman, Roanoke, Virginia, for Appellants. Lela Merrell Hollabaugh, Waller, Lansden, Dortch & Davis, Nashville, Tennessee, for Appellee. **ON BRIEF:** Joseph L. Lyle, Jr., Jeremy P. Hopkins, Waldo & Lyle, P.C., Norfolk, Virginia; Allen Wayne Dudley, Jr., Furrow & Dudley, P.C., Rocky Mount, Virginia, for Appellants. Michael S. Mizell, Waller, Lansden, Dortch & Davis, Nashville, Tennessee, for Appellee.

Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge MICHAEL wrote the opinion, in which Judge NIEMEYER and Judge DIANA GRIBBON MOTZ joined.

OPINION

MICHAEL, Circuit Judge:

The Natural Gas Act (NGA or the Act), 15 U.S.C. § 717f(h), gives a gas company the power to acquire property by eminent domain, but the Act does not provide for immediate possession, that is, possession before just compensation is determined and paid in a condemnation action. The main question in this appeal is whether a gas company can obtain immediate possession through the equitable remedy of a preliminary injunction. We hold that it can. We also hold that the district court properly granted preliminary injunctive relief to the gas company in the several cases consolidated in this appeal; we therefore affirm the injunction orders.

I.

East Tennessee Natural Gas Company (ETNG) is a regional gas transportation company. Several years ago the company developed plans for what it calls the Patriot Project, a project to construct an interstate gas pipeline, twenty-four inches in diameter and about ninety-four miles long, through portions of Tennessee, Virginia, and North Carolina. Before a gas company like ETNG can build and operate a new pipeline, it must obtain a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC or the Commission). The procedure for obtaining a certificate from FERC is set forth in the NGA, I5 U.S.C. § 717 *et seq.*, and its implementing regulations, 18 C.F.R. § 157.1 *et seq.* The process begins with an application from the gas company that includes, among other information, (1) a description of the proposed pipeline project, (2) a statement of the facts showing why the project is required, and (3) the estimated beginning and completion date for the project. 15 U.S.C. § 717f(d) ; 18 C.F.R. § 157.6(b).

Notice of the application is filed in the Federal Register, 15 U.S.C. § 157.9, public comment and protest is allowed, id § 157.10, and FERC conducts a public hearing on the application, *id* § 157.11. As part of its evaluation, FERC must also investigate the environmental consequences of the proposed project and issue an environmental impact statement. *See* 42 U.S.C. § 4332. At the end of the process FERC issues a certificate if it finds that the proposed project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). In its order issuing a certificate, FERC specifies a date for the completion of construction and the start of service. 18 C.F.R. § 157.20(b). The certificate may include any terms and conditions that FERC deems "required by the public convenience and necessity." *Id.* § 157.20. Once FERC has issued a certificate, the NGA empowers the certificate holder to exercise "the right of eminent domain" over any lands needed for the project. 15 U.S.C. § 717f(h).

On July 26, 2001, ETNG filed its application for a certificate of public convenience and necessity for the Patriot Project. *See Preliminary Determination of Non-Environmental Issues* I, 98 FERC ¶ 61331, 2002 WL 471183 (2002). Notice of the application was published in the Federal Register on August 9, 2001. *Id.* at 4. Thereafter, approximately 200 interested parties submitted comments or protests, id. at 4, appendix, and FERC held several public hearings on the application. FERC released its preliminary determination on March 27, 2002. In this document, which did not cover environmental issues, the Commission found that the Patriot Project would help satisfy the growing energy needs in portions of the three-state area of Tennessee, Virginia, and North Carolina. Specifically, the project would supply gas to new electric generation plants, meet the needs of local utilities for additional gas, and bring gas service to portions of southwestern Virginia for the first time. *Id.* at 15. The preliminary determination also noted that "there may be

some adverse impacts on landowners from the construction of the project." *Id.* After weighing these and other factors, FERC concluded that, subject to consideration of environmental issues, the public benefits of the Patriot Project would out-weigh any adverse impacts. *Id.* at 1. The Commission then moved to the environmental review process. Again, the public and interested parties were invited to submit comments and to participate in public meetings. *Order Denying Rehearing, Authorizing Abandonment, and Issuing Certificate* 13-14, 101 FERC ¶ 61188, 2002 WL 31973796 (2002). On September 22, 2003, the Commission issued its final environmental impact statement (FEIS). *Id* at 14. The FEIS recommended a number of mitigation measures that ETNG should take to avoid or minimize environmental damage. *Id* at 14- 19. In the end, the FEIS concluded that construction and operation of the Patriot Project would result in limited adverse environmental impacts. *Id.* at 30.

FERC's sixteen-month review of ETNG's application ended on November 20, 2002, when the Commission by formal order issued ETNG a certificate of public convenience and necessity. *Id* at 1. The FERC order confirms that "[i]ssuance of the certificate ... permits [ETNG] to acquire land for the pipeline by eminent domain, if it cannot reach agreement with the owner of land authorized." *Id.* at 20. The order requires ETNG to complete construction and make the pipeline available for service by January 1, 2005. *Id.* at 31. As the FEIS recommended, the certificate incorporates sixty-nine conditions that ETNG has to meet during construction. *Id* at 31-44. Among other things, the conditions require ETNG to: (I) file weekly status reports with FERC during construction, (2) follow the mitigation measures described in the environmental impact statement, (3) employ environmental inspectors to monitor compliance with the mitigation measures, (4) monitor vegetation for at least two

growing seasons following the completion of the project, and (5) limit construction to daylight hours.

As soon as FERC issued the certificate to ETNG, the company pursued negotiations with the affected landowners to acquire the easements to construct, operate, and maintain the new pipeline. The line will cross over 1,300 tracts of land in Tennessee, Virginia, and North Carolina. Through negotiations with landowners and a limited amount of condemnation litigation in North Carolina and Tennessee, the company was able to acquire over ninety percent of the right-of-way. That left about 130 tracts in Virginia where easements were still needed. In December 2002 ETNG filed 133 actions in the Western District of Virginia seeking orders of condemnation for the easements over the *820 remaining tracts. Within a couple of months of filing the condemnation actions, ETNG was able to settle with the owners of almost fifty of these tracts, leaving eighty-five or so that were still the subject of litigation.

At the same time ETNG filed the condemnation actions, it filed motions for immediate possession of the easements to prevent delays in construction. The NGA's eminent domain provision is silent on the question of immediate possession, so ETNG contended that the district court could use its "inherent equitable power" to grant this relief. J.A. 22 (joint appendix references are to case no. 03-1708(L)). The landowners filed answers challenging the breadth of ETNG's right to condemn, and they opposed the motions for immediate possession. The district court decided to deal with the litigation in stages, dealing first with the questions about ETNG's right to take. Thereafter, if required, the court would consider the motions for immediate possession, leaving the issue of just compensation in each case for last.

On May 8, 2003, the district court issued several identical opinions holding that ETNG could exercise the right of

eminent domain to acquire the necessary easements through the tracts in litigation. In supplemental opinions filed June 6, 2003, the court explained its decision to grant ETNG's motions for immediate possession. The court acknowledged that there is no provision for immediate possession in the NGA. Nevertheless, the court held that it could "use its equitable powers to grant early possession to ETNG in the form of a preliminary injunction." J.A. 76. The court found that ETNG had established its right to immediate possession by satisfying the standards required for a preliminary injunction under *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig*, 550 F.2d 189 (4th Cir.1977). Among other things, the court found that holding up "the project's completion until the compensation for the last parcel is determined" would result in an extended delay. J.A. 78. This delay, the court said, would cause significant financial harm to ETNG and its potential customers. On the other hand, the court found that harm to the landowners would be slight, especially because they had the "right to draw down the money ETNG has deposited with the Court based on [the company's] appraisal." J.A. 78-79. Finally, the court concluded that "expeditious completion of the pipeline is in the public interest." J.A. 79.

The landowners, in several cases that we have consolidated, appeal the district court's preliminary injunction orders granting immediate possession. The landowners' main argument is that ETNG cannot take possession prior to the determination of just compensation. (The landowners now concede that ETNG has a legal right to take the property.) They further argue that even if the district court had the power to award immediate possession by preliminary injunction, the court erred in granting injunctions in these cases. Finally, some of the landowners claim that the district court lacked jurisdiction over their cases because the complaints did not sufficiently identify the property to be taken.

II.

A.

The first question is whether the district court can use its equitable power to order immediate possession in a condemnation case. We begin our discussion by reviewing the mechanics of how the federal power of eminent domain is usually exercised. Congressional authorization is required for land to be condemned by the government for public use. *See United States v. N. Am. Transp. Co.*, 253 U.S. 330, 333-34, 40 S.Ct. 518, 64 L.Ed. 935 (1920); IA J. Sackman, Nichols on Eminent Domain § 3.03[1] (rev.3d ed.). Congress sometimes exercises the power of eminent domain directly by enacting a statute that appropriates specific property. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984). Congress's normal practice, however, is to delegate the power of eminent domain to government officers who may condemn property in the name of the United States for public use. And Congress may, as it did in the NGA, grant condemnation power to "private corporations ... execut[ing] works in which the public is interested." *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406, 25 L.Ed. 206 (1878). Although the federal statutes conferring the power of eminent domain routinely identify the officer who may exercise the power and the purpose for which it may be exercised, the statutes typically do not prescribe the procedural methods or steps for exercising the power. *See, e.g.*, 10 U.S.C. § 2663(a) ("Secretary of a military department may ... acquire by condemnation any interest in land ... needed for the site, construction, or operation of fortifications, coast defenses, or military training camps"); 16 U.S.C. § 404c-11 ("The Secretary of the Interior is authorized in his discretion to acquire for inclusion within the Mammoth Cave National Park by ... condemnation ... any lands ... within the maximum boundaries as authorized by ... this title."); *see also Kirby*, 467

U.S. 1, 3 n. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984). When a condemnation action becomes necessary, a government official has two statutory methods available for exercising the power of eminent domain. Under the first method, called "straight condemnation," the action usually proceeds to a determination of just compensation and final judgment before the condemnor takes possession. *See* 40 U.S.C. § 3113 (formerly codified at 40 U.S.C. § 257); *Kirby*, 467 U.S. at 3-4, 104 S.Ct. 2187. Under the second method, often referred to as "quick-take," the government may take possession of the condemned property at the beginning of the case. *See, e.g.*, 40 U.S.C. § 3114 (formerly codified at 40 U.S.C. § 258a).

In straight condemnation the government official requests the Attorney General to initiate the condemnation action in district court. 40 U.S.C. § 3113. A special rule, Fed.R.Civ.P. 71A, governs the procedure in a condemnation action. *See Kirby*, 467 U.S. at 3-4, 104 S.Ct. 2187. Under Rule 71A the complaint must set forth the authority for the taking, the use for which the property is being taken, the identity of the property, and the interest to be acquired. Fed.R.Civ.P. 71A(c)(2). After the complaint is filed, the action proceeds in due course to the determination of just compensation for the owner of the land. *Id.* § 71A(h). Rule 71A does not contain procedures for dealing with issues of prejudgment possession by the condemning authority. Under traditional procedures, however, the condemning authority takes possession of the property after the determination and payment of just compensation. *See Kirby*, 467 U.S. at 4, 104 S.Ct. 2187; 6 Nichols, *supra*, § 24.10[1]. As the Supreme Court indicated in *Kirby*, when just compensation is determined first, "[t]he practical effect ... is to give the government an option to buy the property at the adjudicated price. If the government wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest in the United States." *Kirby*, 467 U.S. at 4, 104 S.Ct. 2187 (citation omitted). On the other hand, "[i]f the

government decides not to exercise its option, it can move for dismissal of the condemnation action." *Id. See also* Fed.R.Civ.P. 71(A)(i)(3).

The second method of taking, prescribed mainly in the Declaration of Taking Act (DTA), provides the government with a more expeditious procedure. 40 U.S.C. § 3114. The DTA's quick-take provisions authorize the government to take immediate possession of condemned property. [FN*] When the government proceeds under the DTA, it files a "declaration of taking" that, among other things, states the authority for the taking, states the public use for which the land is taken, and provides an estimate of just compensation. Once the government deposits the estimated amount with the court, "to the use of the persons entitled to the compensation," title to the condemned property automatically vests in the United States. *Id.* § 3114(a), (b); *Kirby*, 467 U.S. at 4-5, 104 S.Ct. 2187 . While the DTA gives the government the right of immediate possession, the time and terms of possession are fixed by the district court. 40 U.S.C. § 3114(d)(1). The precise compensation figure is determined later. ETNG did not try to use DTA's quick-take provisions, presumably because the statute only applies to condemnation proceedings "brought by and in the name of the United States." *Id.* § 3114(a).

> FN* The DTA gives any government official with condemnation authority the right to take immediate possession. A few statutes give this right to specific officials. *See, e.g.*, 42 U.S.C. § 5196(i)(1) (Director of the Federal Emergency Management Agency may "procure by condemnation or otherwise ... materials and facilities for emergency preparedness, with the right to take immediate possession thereof'); 33 U.S.C. § 594 (when Secretary of Army is authorized to

> take lands necessary for harbor improvements, he "shall have the right to take immediate possession"); *see also* 10 U.S.C. § 2663(b) ("In time of war or when war is imminent, the United States may, immediately upon the filing of a petition for condemnation ... take and use the land to the extent of the interest sought to be acquired."). These scattered statutes appear to be superfluous to the extent they confer the right of immediate possession, unless they allow an even more expeditious process than the DTA. That is not an issue for today, however.

The Natural Gas Act, like most statutes giving condemnation authority to government officials or private concerns, contains no provision for quick-take or immediate possession. The Act simply says that any holder of a certificate of public convenience and necessity may acquire property "by the exercise of eminent domain in the district court" 15 U.S.C. § 717f(h). The Act further provides that "the practice and procedure in any action or proceeding for that purpose ... shall conform ... with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated." *Id.* Courts, including the district court here, agree that this state procedure requirement has been superseded by Rule 71A. *See N. Border Pipeline Co. v. 64.111 Acres of Land,* 344 F.3d 693 (7th Cir.2003); *S. Natural Gas Co. v. Land, Cullman County,* 197 F.3d 1368, 1374 (11th Cir.1999); *see also Kirby,* 467 U.S. at 4 n. 2, 104 S.Ct. 2187. As we have said, Rule 71A does not provide procedures for allowing early possession. The Advisory Committee that drafted Rule 71A was well aware of the statutes (the DTA was the main one) giving the government the right of immediate possession. The committee considered, but decided against, including procedures in Rule 71A for exercising this right. According

to the committee, "the procedure ... being followed [to allow immediate possession] seems to be giving no trouble, and to draft a rule to fit all the statutes on the subject might create confusion." Fed.R.Civ.P. 71A advisory committee's supplementary report, 11 F.R.D. 222, 228 (Mar.1951). Rule 71A thus contains no language that prohibits a condemnor from pursuing any available procedures to obtain possession prior to the entry of final judgment. These procedures could include an application for a preliminary injunction under Rule 65(a) because the regular rules of civil procedure apply when Rule 71A is silent. *See* Fed.R.Civ.P. 71A(a).

In any event, if the proceedings in the eighty-five separate cases here had taken their normal course under Rule 71A, ETNG would not have been able to enter each tract until just compensation was determined and paid on that tract. ETNG asserted that determining just compensation first would cause great delay in construction and in placing the pipeline in operation. In order to avoid this delay, ETNG filed its motions for immediate possession, contending that it met the standards for a preliminary injunction. The statute (the NGA) that gives it the power to condemn is silent on the issue of immediate possession, and the company did not seek to assert quick-take authority under the DTA. Thus, the specific question raised before the district court, and now presented on appeal, is whether a court may use its equitable powers to grant a preliminary injunction allowing immediate possession when there is no provision for that relief in the NGA or Rule 71A.

B.

A federal court has the power to grant equitable relief, *see Gordon v. Washington*, 295 U.S. 30, 36, 55 S.Ct. 584, 79 L.Ed. 1282 (1935), but this power is circumscribed by the venerable principle that "equity follows the law," *Hedges v.*

Dixon County, 150 U.S. 182, 192, 14 S.Ct. 71, 37 L.Ed. 1044 (1893). Equity, in other words, may not be used to create new substantive rights. *See, e.g., Norwest Bank of Worthington v. Ahlers*, 485 U.S. 197, 206-07, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). However, when a substantive right exists, an equitable remedy may be fashioned to give effect to that right if the prescribed legal remedies are inadequate. *See Berdie v. Kurtz*, 88 F.2d 158, 159 (9th Cir.1937); *Am. Brake Shoe & Foundry Co. v. N.P. Rys. Co.*, 293 F. 633, 637-38 (2d. Cir.1923). The district court followed these principles when it granted ETNG equitable relief in the form of a preliminary injunction that allowed the company to take early possession of the condemned property.

The district court discharged its duty to adjudicate these cases by first taking up the question of whether ETNG had a substantive right to condemn the landowners' property. After considering the briefs of the parties and hearing oral argument, the court issued orders determining that "ETNG has established its right to exercise eminent domain over the [landowners'] property as outlined in the [c]ertificate [of public convenience and necessity issued by FERC]." J.A. 74. These orders gave ETNG an interest in the landowners' property that could be protected in equity if the conditions for granting equitable (in this case, injunctive) relief were satisfied. *See Seymour v. Freer*, 8 Wall. 202, 75 U.S. 202, 213-14, 19 L.Ed. 306 (1868)(when a party has an interest in property "distinct from legal ownership," that interest "constitute[s] an equity which a court of equity will protect and enforce"). Therefore, once ETNG's right to take the easements was determined, it was proper for the district court to consider ETNG's motions for equitable relief in the various cases, specifically, its requests for preliminary injunctions granting immediate possession. As the discussion in part III, *infra*, establishes, the district court carefully considered the requirements for granting a preliminary injunction. A preliminary injunction is, of

course, "appropriate to grant intermediate relief of the same character as that which may be granted finally." *De Beers Consol. Mines, Ltd. v. United States,* 325 U.S. 212, 220, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945). *See also In re Microsoft Corp. Antitrust Litig.,* 333 F.3d 517, 525 (4th Cir.2003). The district court's holding that ETNG had established its right to condemn meant that it would have been entitled to possession upon the entry of final judgment. Because the court found that the requirements for a preliminary injunction had been met, the court granted immediate possession to ETNG as a form of intermediate relief. Again, the district court followed established principles and procedures in granting equitable relief. The landowners argue that general principles of equity are inapplicable here because equitable relief in the form of immediate possession is barred in a condemnation case. We disagree.

To begin with, the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid. As the Supreme Court said a long time ago, the Constitution "does not provide or require that compensation be paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed." *Cherokee Nation v. S. Kan. Ry. Co.,* 135 U.S. 641, 659, 10 S.Ct. 965, 34 L.Ed. 295 (1890). Rule 71A provides the procedure for determining just compensation, and ETNG has deposited cash with the court in an amount equal to the appraised value of the interests condemned. If the deposit is somehow short, ETNG will be able to make up the difference. In 2002 ENTG's parent company reported earnings of $1.17 billion from its natural gas transmission division that includes ETNG. There is thus adequate assurance that the landowners will receive their just compensation. *See Wash. Metro. Area Transit Auth. v. One Parcel of Land* 706 F.2d 1312, 1321 (4th Cir.1983) (fact that

agency could be sued and had substantial assets was sufficient to assure just compensation).

The landowners argue that Congress does not intend for gas companies to gain immediate possession because it has not granted statutory quick-take power to gas companies as it has to government officers who condemn property in the name of the United States. This argument overlooks the preliminary injunction remedy provided in the Federal Rules of Civil Procedure that were adopted with the tacit approval of Congress. *See* 28 U.S.C. §§ 2072, 2074. Two rules are pertinent, Rule 65(a) and Rule 71A. Rule 65(a), which specifically allows for preliminary injunctions, was adopted with the original rules in 1937. Rule 71A, the special rule for condemnation actions, came along later, in 1951. As we have already mentioned, Rule 71A does not include any provisions governing the exercise of immediate possession. Rule 71A provides, however, that the regular rules of procedure apply to any subject not covered by the special rule. Fed.R.Civ.P. 71A(a). Under the rules, then, a gas company with condemnation power under the NGA may apply under Rule 65(a) for a preliminary injunction awarding immediate possession. The gas company must, of course, establish that it is entitled to equitable relief. Congress has never given any indication that it disapproves of this procedure. Indeed, because Congress has not acted to restrict the availability of Rule 65(a)'s equitable (injunctive) remedy in an NGA condemnation, we conclude that the rule applies. *See Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960) ("Equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.").

The subtext of the landowners' argument that only Congress can grant the right of immediate possession is this: the preliminary injunction process does not provide the landowner with procedural safe-guards that are comparable

to those provided by Congress in the DTA. We disagree. Although the procedural safeguards in the preliminary injunction process are not a perfect match with those in the DTA, a comparison shows that the landowner is adequately protected when the condemnor obtains immediate possession under either procedure. In a DTA case the government exercises its right to immediate possession with minimal judicial oversight. Title and the right to possession vest in the government immediately upon the filing of a declaration and the requisite deposit. *See* 40 U.S.C. § 3114; *Kirby*, 467 U.S. at 4-5, 104 S.Ct. 2187. Although the district court fixes the time and any terms of the possession, the government takes possession of the condemned property as a matter of course, unless the landowner or occupant demonstrates some undue hardship that warrants a delay. *See, e.g., United States v. Certain Land in the Borough of Manhattan*, 332 F.2d 679, 680-82 (2d Cir.1964) (possession delayed when government sought to oust tenants on five days' notice); *United States v. 6,576.27 Acres of Land*, 77 F.Supp. 244, 246 (D.N.D.1948) (eviction delayed when "it would be difficult, if not impossible, for ... farm families to move by the date fixed in the order"). In a condemnation case under the NGA, a gas company that seeks immediate possession has a much stiffer burden than the government does under the DTA. Because title in an NGA case does not pass until compensation is determined and paid, *see Danforth v. United States*, 308 U.S. 271, 284-85, 60 S.Ct. 231, 84 L.Ed. 240 (1939), the company's motion for immediate possession triggers a threshold requirement. The district court must determine that the company has the right to condemn the property in question. *See Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F.Supp.2d 976 (N.D.Ill.2002). Once the right to condemn is established by court order, it follows that the company will be entitled to possession when title is transferred at the end of the case. The question then becomes whether the relief that will be appropriate at the end (that is, possession) should be

granted at an earlier stage. To obtain this intermediate relief, the gas company must satisfy the strict requirements for a preliminary injunction. For example, the company must demonstrate that it will suffer irreparable harm without immediate possession, and the company's harm must be weighed against any harm to the landowner. *See Safety-Kleen, Inc. v. Wyche,* 274 F.3d 846, 859 (4th Cir.2001). In this case ETNG was awarded possession only after it engaged in five months of intensive litigation that analyzed and determined its right to take and its right to equitable relief (an injunction).

In comparing the protections of the DTA to those in injunction proceedings, we return briefly to the matter of title and the payment of just compensation. Again, title passes immediately to the government under the DTA. There is the possibility, of course, that the government, in making its deposit to cover compensation, will underestimate the value of the land. In that case, the landowner is protected because the government undertakes to pay the difference between the adjudicated value of the land and the deposit. *Kirby,* 467 U.S. at 5, 104 S.Ct. 2187. In an NGA condemnation where early possession is granted to a gas company, the landowner is protected in a different way, that is, by "the rule that title does not pass until just compensation has been ascertained and paid." *Danforth,* 308 U.S. at 284-85, 60 S.Ct. 231. Therefore, if the gas company's deposit (or bond) is less than the final compensation awarded, and the company fails to pay the difference within a reasonable time, "it will become a trespasser, and liable to be proceeded against as such." *Cherokee Nation,* 135 U.S. at 660, 10 S.Ct. 965. Likewise, if a FERC-regulated gas company was somehow permitted to abandon a pipeline project (and possession) in the midst of a condemnation proceeding, the company would be liable to the landowner for the time it occupied the land and for any "damages resulting to the [land] and to fixtures and improvements, or

for the cost of restoration." 4 J. Sackman, Nichols on Eminent Domain § 12E.01 [07] (rev.3d ed). *See also* Fed.R.Civ.P. 71A(i)(3) (district court "shall not dismiss [condemnation] action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest taken"). For all of these reasons, we conclude that when a gas company initiating a condemnation action under the NGA seeks immediate possession by preliminary injunction, there are sufficient safeguards in place to protect the landowner.

The landowners also argue that because statutes granting the power of eminent domain must be strictly construed, equity cannot be invoked to supply the remedy of immediate possession. This argument is rooted in the principle that "[t]he grant of authority to condemn for specific purposes must be construed as limited to the enumerated purposes." IA Nichols, *supra,* § 3.03 [3][d]. The property in this case is being condemned for the strict purpose authorized by the NGA, to build a pipeline that FERC deems necessary to supply natural gas. Moreover, our circuit has never interpreted the strict construction principle to mean that equity cannot allow for the possession of property condemned under the NGA before a case is finally ended. In *Atlantic Seaboard Corp. v. Van Sterkenburg,* 318 F.2d 455 (4th Cir.1963), a natural gas company sought possession of an easement for a new pipeline while the landowner appealed his award of just compensation. The district court authorized possession conditioned on the company's deposit of the award into the court's registry account. The landowner also appealed the order granting possession, arguing that Rule 71A did not authorize the district court to provide such relief. Our court recognized that Rule 71A did not spell out procedures for the grant of early possession. Nevertheless, our court said that "inherently, the condemnation court possesses the power to authorize

immediate entry by the condemnor upon the condemned premises." *Id* at 460. In upholding the order of early possession, our court observed that a landowner, protected by a deposit, should not be allowed "to postpone the condemnor's enjoyment of the premises, imposing upon the condemnor great, perhaps irreparable damage, all without risk of further loss or injury to the owner." *Id.* We recognize, of course, that the *Atlantic Seaboard* case was much further along than today's case when possession was authorized. Nevertheless, *Atlantic Seaboard* demonstrates that a court may use its equitable power to authorize early possession.

Finally, the landowners' argument that equity cannot be invoked here ignores the fact that there is a substantial public interest--the need for natural gas supply--at stake in this case. As the Supreme Court has said, courts of equity may go to greater lengths to give "relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Va. Ry. Co. v. Sys. Fed'n No. 40,* 300 U.S. 515, 552, 57 S.Ct. 592, 81 L.Ed. 789 (1937). *See also United States v. Morgan,* 307 U.S. 183, 194, 59 S.Ct. 795, 83 L.Ed. 1211 (1939); *United States ex rel. Rahman v. Oncology Assocs., P.C.,* 198 F.3d 489, 497 (4th Cir.1999). FERC spent sixteen months evaluating the need for the Patriot Project. Ultimately, it concluded that the project was required by the public convenience and necessity. It was therefore appropriate for the district court to weigh the public benefit of expeditious project construction in deciding that it could use its equitable power in this case.

District courts in a number of jurisdictions have done exactly what the district court did here, that is, grant immediate possession in the form of a preliminary injunction to a gas company that has established its right to condemn under the NGA. *See Northwest Pipeline Corp. v. The 20' by 1,430' Pipeline Right of Way,* 197 F.Supp.2d 1241, 1245 (E.D.Wash.2002)("[w]here there is no dispute about the

validity of [the gas company's] actual right to the easement," denying authority to grant immediate possession "would produce an absurd result"); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land,* 210 F.Supp.2d 976, 979 (N.D.I11.2002)(immediate possession proper when condemnation order has been entered and preliminary injunction standards have been satisfied); *N. Border Pipeline Co. v. 64.111 Acres of Land,* 125 F.Supp.2d 299, 301 (N.D.I11.2000)(same); *see also N. Border Pipeline Co. v. 127.79 Acres of Lana* 520 F.Supp. 170, 173 (D.N.D.1981) ("the Court believes the circumstances of this case warrant the exercise of inherent powers"); *Williston Basin Interstate Pipeline Co. v. Easement and Right-of-Way Across .152 Acres of Land,* 2003 WL 21524816 (D.N.D.2003)(same); *Tenn. Gas Pipeline Co. v. New England Power, Inc.,* 6 F.Supp.2d 102, 104 (D.Mass.1998)(same); *USG Pipeline Co. v. 1.74 Acres,* 1 F.Supp.2d 816, 825- 26 (E.D.Tenn.1998) (same); *Kern River Gas Transmission Co. v. Clark County,* 757 F.Supp. 1110, 1117 (D.Nev.1990) (same); *Humphries v. Williams Natural Gas Co.,* 48 F.Supp.2d 1276, 1280 (D.Kan.1999)("[I]t is apparently well settled that the district court does have the equitable power to grant immediate entry and possession [under the NGA]."); *Rivers Electric Co., Inc. v. 4.6 Acres of Land,* 731 F.Supp. 83, 87 (N.D.N.Y.1990)(granting immediate possession under a statute similar to the NGA). *Cf. Commercial Station Post Office, Inc. v. United States,* 48 F.2d 183, 184-85 (8th Cir.1931)(holding that government officer who exercises statutory authority to file condemnation action may take immediate possession of the property even though there is no express provision authorizing pre judgment possession).

One circuit case, *Northern Border Pipeline Co. v. 86.72 Acres of Land,* 144 F.3d 469 (7th Cir.1998), has held that a district court lacked authority to grant a condemnor immediate possession under the NGA. But that case involved an entirely different set of circumstances than those presented

here. Specifically, the gas company in *Northern Border* did not obtain an order determining that it had the right to condemn before it sought a preliminary injunction. Its motion for an injunction was based entirely on the existence of a certificate of public convenience and necessity. Under those circumstances, the Seventh Circuit held that the gas company had no right to equitable relief because the company "did not present an argument grounded in substantive law establishing a preexisting entitlement to the property." *Id* at 472. Two district court decisions in the Seventh Circuit have interpreted *Northern Border* to mean that immediate possession is improper only when there has been no order confirming the right to condemn. *N. Border Pipeline Co. v. 64.111 Acres of Land* 125 F.Supp.2d 299, 301 (N.D.Ill.2000)("in this case, plaintiff does have a preexisting entitlement to the easements, the judgments of condemnation, which make an award of possession appropriate"); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land,* 210 F.Supp.2d 976, 979 (N.D.Ill.2002) (same). We agree with the assessment of the two district courts. The gas company in *Northern Border* had simply failed to seek an order determining that it had the right to condemn. Without having that right in substantive law determined, the company could not invoke equity.

In summary, the district court followed established principles of equity in determining that it had the power to award preliminary injunctive relief to ETNG in the form of immediate possession. Neither the Constitution, nor Congress, nor Rule 71A bars this sort of relief in a condemnation case. In this case, the public interest factor--the need for natural gas in a region with little or no service--made it especially appropriate for the district court to consider equitable relief that would allow expeditious construction of the pipeline. A number of district courts around the country have also determined that they have the equitable power to grant immediate possession to a gas

company filing a condemnation action under the NGA. We agree with this position. Accordingly, we hold that once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction.

III.

Because the district court had the authority to grant immediate possession through a preliminary injunction, we must consider the landowners' alternative argument that ETNG does not satisfy the basic requirements for a preliminary injunction. We review the decision to grant a preliminary injunction for abuse of discretion. Factual determinations are reviewed for clear error and legal conclusions de novo. *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 859 (4th Cir.2001). In deciding whether to grant a preliminary injunction, a court should consider (1) the likelihood of irreparable harm to the plaintiff if the injunction is denied, (2) the likelihood of harm to the defendant if the injunction is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193-96 (4th Cir.1977). The district court issued preliminary injunction orders that mandated affirmative relief (immediate possession) to ETNG. We have said that "[m]andatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief." *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir.1980). *See also In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir.2003). We will now review the district court's preliminary injunction decision, starting with the *Blackwelder* factors.

1. *The likelihood of irreparable harm to ETNG.*

The district court found that without a preliminary injunction the Patriot Project would suffer "undue delay" and that this delay would cause "significant financial harm both to ETNG and some of its putative customers." J.A. 78. This finding has ample support in the record. The court pointed out that separate hearings on compensation would be required for each of the eighty-five tracts involved. Scheduling and conducting those hearings, the district court noted, "will obviously take an extended period of time." J.A. 78. ETNG estimated that if possession on some tracts was deferred until completion of the hearings, construction could be delayed until the Summer of 2004 or beyond. Constructing a ninety-four-mile pipeline is a complex project that can only progress in phases. Certain portions of the project have to be completed before construction can begin on other portions. Therefore, as the district court recognized, "any single parcel has the potential of holding up the entire project." J.A. 78. Continuing, the court said, "[t]o require ETNG to build up to a parcel of land [it] do[es] not possess, skip that parcel, and then continue on the other side would prove wasteful and inefficient." *Id.* Furthermore, ETNG is under an order from FERC to complete construction and have the pipeline in operation by January I, 2005. It would not be possible to meet FERC's deadline without a preliminary injunction.

ETNG is also under contractual obligation to provide natural gas to several electric generation plants and local gas utilities by certain dates. Without a preliminary injunction, ETNG would be forced to breach these contracts. ETNG's inability to satisfy these commitments would have negative impacts on its customers and the consumers they serve. For example, two electric generation plants will not be able to operate at full capacity without natural gas from the Patriot Project. A North Carolina gas utility may not be able to meet

its customers' demand for gas if ETNG does not complete the project on time. ETNG estimates that it would lose in excess of $5 million if construction delay caused it to breach its contractual obligations to supply gas. Finally, delay in the construction of the pipeline would hinder economic development efforts in several Virginia counties.

2. *The likelihood of harm to the landowners.*

[The landowners claim that ETNG's early possession will disturb the productive capacity of their land. This is simply a timing argument because productive capacity would still be disturbed, albeit at a later time, if just compensation was determined first. In any event, as the district court observed, the early loss of use argument "is blunted by [the landowners] right to draw down the money ETNG has deposited with the Court based on ETNG's appraisal," that is, an independent appraisal obtained by the company. J.A. 78-79. The landowners also argue that by awarding ETNG early possession, the district court undermined their ability to negotiate a favorable price for their land. This argument is unconvincing because the Fifth Amendment guarantees the landowners just compensation for their land no matter when the condemnor takes possession. Finally, the landowners argue that taking property before determining just compensation constitutes a type of inherent harm that is irreparable, especially when lands have been held in the same family for many years. We fully understand that condemnation often forces landowners to part with land that they would prefer to keep for many reasons, including sentimental ones. However, the Supreme Court long ago recognized that "in view of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it ... is properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5, 69 S.Ct.

1434, 93 L.Ed. 1765 (1949). In the end, the district court concluded that the harm to the landowners due to early possession is "slight at best." J.A. 79. The record supports this conclusion, and any harm to the landowners is clearly outweighed by ETNG's immediate need for the property.

3. *The likelihood that ETNG will succeed on the merits.*

ETNG has a determination on the merits that it has a right to condemn the landowners' property, and the landowners now concede that ETNG possesses this right. Success on the merits for ETNG is therefore apparent.

4. *The public interest.*

[The district court concluded that "expeditious completion of the pipeline is in the public interest." J.A. 79. Congress passed the Natural Gas Act and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices. *Clark v. Gulf Oil Corp.*, 570 F.2d 1138, 1145-46 (3d Cir.1977); *Fla. Power & Light Co. v. Federal Energy Regulatory Comm'n, 598* F.2d 370, 379 (5th Cir.1979); *Public Serv. Comm'n of Ky. v. Federal Energy Regulatory Comm'n*, 610 F.2d 439, 442-43 (6th Cir.1979). As the district court observed, FERC conducted a careful analysis of the Patriot Project and determined that the project will promote these congressional goals and serve the public interest. The project serves the public interest because, among other things, it will bring natural gas to portions of southwest Virginia for the first time. This will make gas available to consumers, and it will help in the efforts of local communities to attract much-needed new business. On a larger scale, the pipeline will make gas available for electric power generation plants. A delay in construction would postpone these benefits.

Because our review must be "more searching when the preliminary injunctive relief ordered by the district court is mandatory," *Microsoft Antitrust Litig.*, 333 F.3d at 525, we will consider whether the circumstances are sufficiently demanding for the award of mandatory relief. We conclude that they are. First, ETNG's right to take the easements for the Patriot Project is indisputably clear, as the district court determined. Second, a federal agency, FERC, determined that the project is necessary to serve the public interest, specifically, the public need for natural gas in areas that have no gas service or that are underserved. To assure that these needs are met in good time, FERC has ordered ETNG to complete the project by January 1, 2005. Third, ETNG could not meet FERC's deadline without immediate possession. And without this mandatory relief, ETNG would face other irreparable harm such as increased construction costs and losses from its breach of gas supply contracts. Preliminary injunctive relief of a mandatory nature was therefore appropriate in these cases.

After considering the *Blackwelder* factors and the propriety of mandatory relief, we conclude that the district court did not abuse its discretion in entering the preliminary injunction orders in these cases.

IV.

Some of the landowners argue that the district court lacked jurisdiction over their cases because ETNG's condemnation complaints did not sufficiently identify the property to be taken. Rule 71A(c)(2) requires a condemnation complaint to include "a description of the property sufficient for its identification." Fed.R.Civ.P. 71A(c)(2). Each of ETNG's complaints provides a legal description of the tract of land through which the pipeline will run and a detailed plat showing the location of the easement. In instances where construction considerations have required a change in

location, amended plats have been filed with the district court and provided to the landowners. All of this is sufficient to satisfy Rule 71A(c)(2) and any jurisdictional requirement relating to property descriptions. *See S. Natural Gas Co. v. Land, Cullman County,* 197 F.3d 1368, 1375 (11th Cir.1999); *Guardian Pipeline, L.L.C. v. 529.42 Acres of Land,* 210 F.Supp.2d 971, 975 (N.D.Ill.2002).

V.

In sum, we hold that once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may use its equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction. Because the district court did not abuse its discretion in granting preliminary injunctive relief to ETNG in these cases, we affirm the district court's orders.

AFFIRMED.

FILED: July 9, 2003
[ENTERED: July 9, 2003]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-1708 (L)
(CA-02-170-4)

EAST TENNESSEE NATURAL GAS COMPANY,

Plaintiff - Appellee,

versus

JOHN F. SAGE; LINDA K. SAGE,

Defendants - Appellants,

and

1.20 ACRES IN WYTHE COUNTY, VIRGINIA;
MARY CASEL, Commissioner of Revenue;
JOHN DOE, et al.; UNKNOWN OWNERS

Defendants.

O R D E R

Appellants have filed a motion for stay and a motion for oral argument on the stay. Appellee has filed a response in opposition to the motion for stay. Appellants have filed a motion to expedite appeal, and appellee has filed a response.

The Court denies appellants' motion for stay and motion for oral argument on the stay. The Court grants appellants' motion to expedite the appeal. The Clerk is directed to establish an expedited briefing schedule. This case is tentatively calendared for oral argument at the September 23-26, 2003, session of Court.

Entered at the direction of Judge Niemeyer, with the concurrence of Judge Michael and Judge Motz.

For the Court
/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

EAST TENNESSEE NATURAL GAS COMPANY,	)	Case No. 4:02cv00125
Plaintiff,	)	**SUPPLEMENTAL MEMORANDUM OPINION**
v.	)	
VARIOUS PARCELS OF LAND,	)	By: Jackson L. Kiser Senior United States District Judge
Defendants.	)	

FILED: June 6, 2003
[ENTERED: June 6, 2003]

I. Factual Background

On February 28, 2003, the Court heard oral argument on the East Tennessee Natural Gas's ("ETNG" or "plaintiff') motion for immediate possession, and on March 4, 2203, I took the motion under advisement until I had considered the question of whether ETNG had been granted the power to condemn the defendants' property. On May 8, 2003, the Court entered an opinion and order granting ETNG's motions for possession which addressed the various arguments of the defendants as to ETNG's power to exercise its right of eminent domain. What I failed to address at that time, however, were the defendants' deferred arguments against ETNG's immediate possession of the various parcels of land.

II. Parties' Contentions

The arguments consist of two basic assertions:

1. The Natural Gas Act ("NGA") does not contain a provision for immediate possession.

2. Immediate possession can be granted to ETNG only by the exercise of the Court's equitable powers and it would be inequitable for the Court to grant ETNG immediate possession. I will address the arguments in turn.

III. Analysis

The defendants are correct and ETNG agrees that there is no grant of the right to immediate possession in the NGA. *See Northern Border Pipeline Co. v. 127.79 Acres of Land,* 520 F. Supp. 170 (D.N.D. 1981). Moreover, the defendant's argue that because Congress did not include the right in the NGA (as it has in other statutes, *see* 40 U.S.C. § 3114, the Declaration of Taking Act), an exercise of the Court's equitable powers to grant the right to early possession would be, in effect, amending the Act and thereby usurping the legislative powers of Congress. *See* Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Immediate Possession at 3-7. With all due respect, I disagree with this rationale. As I see it, Congress did not give a private condemnor the right to immediate possession so that this issue would be left to the courts to consider on a case-by-case basis. By so doing, the condemnor would be under the supervision of the court rather than having carte blanc authority to enter the property. Thus, Congress entrusted the issue of immediate possession to the equitable powers of the Court. *Atlantic Seaboard Corporation v. Van Sterkenburg,* 318 F.2d 455 (4th Cir. 1963) ("Inherently, however, the condemnation court possesses the power to authorize immediate entry by the condemnor upon the condemned premises"); *Tenn. Gas Pipeline Co. v. New England Power,*

C.T.L., Inc., 6 F. Supp.2d 102, 104 (D. Mass.1998) ("[T]he district court does have the equitable power to grant immediate entry and possession where such relief is essential to the pipeline construction schedule."); *see Northern Border Pipeline Co. v. 127.79 Acres of Land, 520 F.* Supp. 170, 172 (D.N.D. 1981). This brings me to the next argument of the defendants as to whether the Court should use its equitable powers to grant early possession to ETNG in the form of a preliminary injunction. I think it should.

Although no court in this circuit has considered the issue of immediate possession after the plaintiff's power of condemnation has been affirmed but before compensation has been awarded, other districts have done so and have found that the court's inherent powers extend that far as long as the plaintiff is able to meet the requirements for injunctive relief. *See generally Northwest Pipeline Corp. v. The 20'x 1,430' Pipeline Right of Way Easement 'x 1560' Temporary Staging Area, 197* F. *Supp.2d* 1241 (E.D. Wash. 2002); *Northern Border Pipeline Co. v. 64.111 Acres of Land,* 125 F. Supp.2d 299, 301 (N.D. Ill. 2000); *Tenn. Gas Pipeline Co. v. New England Power, C.T.L., Inc., 6* F. Supp. 2d 102, 104 (D. Mass.1998); *USG Pipeline Co. v. 1.74 Acres of Land,* 1 F. Supp. 2d 816 (ED. Tenn. 1998).

In the Fourth Circuit, the standard for injunctive relief has long been the four-part test set forth *in Blackwelder Furniture Company of Statesville, Inc., v. Selig Manufacturing Company, Inc.*, 550 F.2d 189 (4th Cir. 1977).. That test requires the district court to determine "(1) the likelihood of irreparable harm to the plaintiff if preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits and (4) the public interest" *Direx Isreal. Ltd., v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991); *see Blackwelder,* 550 F.2d at 193-95.

In weighing the harm to the plaintiff against the harm to the defendant, the third factor, plaintiff's likelihood of success plays an important role. If the plaintiff's likelihood of success is great, the extent of the harm he may suffer need be only slight. Conversely, if plaintiff's likelihood of success is slight, then the hann he may suffer must be great. The corollary to this is that where the plaintiff's likelihood of success is great, the defendant's harm must be great.

The issues as to whether ETNG had the power and the right to condemn the various parcels of land were resolved in the Court's May 8 opinion and order. Thus, element 3 of the *Blackwelder* test --- plaintiff's likelihood of success - is not open to speculation. Plaintiff has already prevailed on that issue. Consequently, plaintiff need only show slight harm and defendant must suffer great harm. I find that an extended delay would harm the plaintiff. Of the numerous parcels of property involved in the project,[1] only the ones under consideration have not permitted the commencement of construction. To require ETNG to build up to a parcel of land they do not possess, skip that parcel, and then continue on the other side would be inefficient and wasteful. Moreover, it would cause undue delay and "significant financial harm" both to ETNG and some of its putative customers. Affidavit of Rick Smith, ¶ 6.

Defendants argue that there is a legal remedy for delay expenses and, therefore, a cause in equity does not lie. I disagree. The argument would be more persuasive if there were but a single parcel of land involved, such as *National Fuel Gas Supply v. 138 Acres,* 186 F. Supp. 2d 339 (W.D.N.Y. 2001), but here there is a series of parcels owned by different landowners and any single parcel has the potential of holding up the entire project. There remains some 85 parcels

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[1] In the Commonwealth of Virginia, ETNG has brought condemnation actions against 133 parcels.

that will be the subject of a just compensation before a commission. Obviously, that will take an extended period of time. To delay the project's completion until the compensation for the last parcel is determined would be inequitable. Plaintiff has demonstrated more than slight harm.

The defendants are unable to prove that they would suffer great harm. The only harm the defendants have shown is a delay in having their compensation determined before surrendering possession of their property. Even this is blunted by their right to draw down the money ETNG has deposited with the Court based on ETNG's appraisal. The defendants' harm is slight at best.

Part four of the *Blackwelder* test - public interest - was resolved by FERC insofar as the pipeline being in the public interest is concerned. FERC also conditions its certificate to try to address the concerns of the landowners. FERC, having determined the need for the pipeline and the conditions under which it could be built, it seems to me that an expeditious completion of the pipeline is in the public interest.

IV. Conclusion

Taking all of this into account, I find that ETNG has met all four requirements under *Blankwelder*. In doing so, it has established a right to immediate possession of the delineate easement on the defendant's property. Therefore, the orders granting immediate possession were appropriately entered.

/s/ Jackson L. Kiser
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

EAST TENNESSEE NATURAL GAS CO.,	)	
Plaintiff,	)	
vs.	)	Civil Action No. 4:02cv00125
2.26 ACRES IN CARROLL COUNTY, VIRGINIA, MAYNARD R. JOYCE, JANE A. HARRISON, COUNTY ASSESSOR, JOHN DOE, et al. And UNKNOWN OWNERS, Defendants.	)	

FILED: May 30, 2003
[ENTERED: May 30, 2003]

ORDER GRANTING POSSESSION

East Tennessee Natural Gas Company filed its complaint for condemnation in the above-entitled proceedings, in which it is prayed that this Court enter an order granting to it immediate possession of the lands described in the Complaint. As set forth in detail in the Order and Memorandum Opinion filed on May 8, 2003, ETNG has established its right to exercise eminent domain over the Defendants' property as outlined in the Certificate of Public Convenience and Necessity ("Certificate"), and thus its motion for immediate possession should be granted. ETNG shall comply with all general conditions applicable to Defendants' property as set forth in the Certificate. The Certificate does not contain any conditions that are unique to this property.

It is hereby ORDERED that East Tennessee Natural Gas Company be put into immediate possession of the property sought to be condemned in the above-entitled action, and that the defendants in such action surrender possession of the said property to East Tennessee Natural Gas Company accordingly. The United States Marshall's office is ordered to aid the Plaintiff in enforcement of this Order as necessary.

Done this 30th day of May, 2003.

/s/ Jackson L. Kiser
JACKSON L. KISER
SENIOR UNITED STATES DISTRICT JUDGE

SUBMITTED FOR ENTRY:

/s/ Stephen W. Earp
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Attorneys for Plaintiff East Tennessee Natural Gas Co.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon the following parties by U.S. Mail, postage prepaid, this 12th day of May, 2003:

Joseph T. Waldo
Joseph L. Lyle, Jr.
Waldo & Lyle
301 West Freemason Street
Norfolk, VA 23510

/s/ Stephen W. Earp

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

EAST TENNESSEE NATURAL GAS COMPANY,	) Case No. 4:02CV00125
Plaintiff,	) **MEMORANDUM OPINION**
2.26 ACRES IN CARROLL COUNTY,	) By: Jackson L. Kiser Senior United States
Defendants.	) District Judge

FILED: May 8, 2003
[ENTERED: May 8, 2003]

I. Factual Background

On November 22, 2002, the Federal Energy Regulatory Committee ("FERC") granted the petitioner, East Tennessee Natural Gas Company ("ETNG"), a Certificate of Public Convenience and Necessity ("Certificate") to construct an integrated interstate gas pipeline through eastern Tennessee and western Virginia. This endeavor, referred to as the "Patriot Project," authorizes the installation of 93.6 miles of 24-inch diameter pipeline through Carroll, Floyd, Henry, Patrick, and Wythe Counties, Virginia. The Certificate was issued after a hearing was conducted by FERC after the statutorily required notice was given.

The Certificate thoroughly covers all of the procedures and conditions that ETNG must adhere to in constructing the pipeline, including:

1. Following procedures and mitigation measures outlined in its application and environmental impact statement;

2. Filing detailed alignment maps and aerial photographs of all proposed facility locations, route realignments, staging areas, pipe store yards, and new access not previously identified;

3. Filing an initial Implementation Plan with the Secretary describing how ETNG will implement EERC's mandates, including procedures for training and compliance;

4. Employing two environmental inspectors per spread on the Patriot Extension to monitor compliance with all requirements;

5. Filing weekly status reports with FERC listing status changes, problerns and noncompliance encountered, and corrective actions;

6. Filing revised tables with FERC after surveying individual property tracts;

7. Survey land before blasting for structures that may be affected and giving landowners 24-hour notice of blasting;

8. Installing temporary erosion controls after disturbing soil;

9. Providing compaction testing of topsoil and subsoil;

10. Monitoring vegetation for at least two growing seasons;

11. Monitoring water quality and yield of wells within 150 feet of pipeline activities;

12. Ensuring property is cleaned and restored within ten days of backfilling of trench;

13. Planning for notification of landowners when their property is traversed and when testing is to be done and informing them of dates and procedures;

14. Limiting construction times to daylight hours;

15. Identifying septic systems, avoiding them where possible, and removing and replacing system when unable to avoid;

16. Limiting construction activities to the are of the permanent easement; and

17. Providing each landowner with a Construction Alignment Sheet showing the construction area and other pertinent information.

Certificate of Public Convenience and Necessity, Appendix ¶ 1-55. FERC also mandates that any changes other than "minor field realignments per landowner needs and requirements" be reported to the Secretary and receive review and approval by the Director of the Office of Energy Projects. *Id.* at ¶ 5.

After receiving the Certificate, ETNG immediately made a motion for possession on the land that it had been unable to acquire through negotiations. On December 12, 2002, ETNG moved for immediate possession, and the court heard oral arguments on the issue on February 28, 2003. On March 4, 2003, I entered an order taking the motion for immediate possession under advisement and bifurcating the case to consider ETNG's right to condemnation first and then assign all compensation issues to a commission as allowed by Rule 71A. The parties were given deadlines to file brief dealing with the issue of the plaintiffs power to condemn and oral argument on the issue was heard on April 10, 2003. The sole purpose of this opinion is to address the plaintiff's right to condemn the defendants' property. While the court recognizes that these cases have not been consolidated, in the interest of judicial efficiency I have incorporated all claims into a single opinion.

II. Motion for Possession

The defendants' defenses to the plaintiff's case can be condensed to three major issues, one of which can be broken down further. First, they contend that the plaintiff s complaint is fatally defective in that it fails to adequately describe the property that is being condemned. Second, they argue that ETNG has failed to properly comply with substantive state law. Specifically, they state that the plaintiff has (1) failed to follow Va. Code § 25-248 which mandates that landowners "be given an opportunity to accompany the appraiser during his inspection of the property; (2) that ETNG violated Va. Code § 25-46.5 by not giving the landowners written statements of the valuation process or a copy of the condemnor's appraisal; and (3) that ETNG has not bargained in good faith with the landowners as required by Va. Code § 25-46.5 and 15 U.S.C. § 717f(h). Finally, some of the defendants have offered individualized claims arguing that the court should change or enforce the

duties established in the FERC Certificate, and at least one set of landowners contend that granting ETNG's motion for possession would violate the Takings Clause of the Fifth Amendment and their Due Process rights. I will address each of these claims in turn.

A. ETNG has failed to adequately describe property

Certain of the defendants contend that ETNG has not filed a properly pled complaint, which they argue is a 'jurisdictional prerequisite" to this court's authority. They argue, quoting the state code and state case law, that ETNG is violating their clients due process rights by not being specific enough about the easements it is seeking.[1] To support their arguments, the defendants point to *United States v. Causby, 328* U.S. *256, 267 (1945),* the famous "airplanes over the chicken farm" case, which they point out states that "an accurate description of the property taken is essential." In that case, the Court disagreed with the Court of Claims contention that the government had taken an easement by allowing planes to fly over the defendant's property. The error, according to the Court, was that there was no findings made as to the altitude, frequency, type of aircraft, or whether the easement was temporary or permanent. The Court pointed to federal statutes that required findings of fact and concluded that it was "premature" for them to make a review of the Court of Claim's compensation award until they knew whether the easement was temporary or permanent. The posture and timing of *Causby* make it easily differentiable from the case at hand. First, the Court did not find that there was any defect in the pleading, which it could not have since the Government had been the original defendants, but it only

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[1] Note that this lack of specificity also plays into the defendants' defense that ETNG has not negotiated in good faith. The argument goes that no landowner can reasonably assess or reply to an offer unless they know what it is for.

stated what findings the district court was required to make before establishing compensation. Second, this case took place six years before Congress adopted Rule 71A, which means that the statutes requiring specific factual findings have now been superceded.

The defendants admit that ETNG has included a surveyed plat map to give the specifics of the easement, but they claim that it is deficient for the purpose because ETNG admits on the survey that the "actual location of easement is determined by the pipeline as installed." If the location is not definitely known, the defendants point out, then the landowners have not been given adequate notice. For example, the pipeline could be projected through unused, low-value land and could end up going through used, higher-valued land. They assert that since the claims fail to meet the jurisdictional requirements, the cases should be dismissed.

While there does not appear to be any Fourth Circuit precedent on this specific issue, other courts have decisively addressed it. In *Southern Natural Gas Co. v. Land, Cullman County,* 197 F.3d 1368, 1375 (11th Cit. 1999), the court held that a legal description of the property and a plat map showing the placement of the pipeline were sufficient to identify the property under Rule 71A(c)(2). *See Guardian Pipeline, L.L. C. v. 529.42 Acres of Land, 210* F. Supp. 2d 971, 975 (N.D. Ill. 2002) (" [L]egal descriptions and plat maps easily satisfy the federal requirement that a condemnation complaint include a description for the property sufficient for its identification."). The proposed route of the pipeline was enough, even if the final easement was different. *See USG Pipeline Co. v. 1.74 Acres in Marion County, TN, 1* F. Supp. 2d 816, 823, 825 (E.D. Tenn. 1998) (noting that gas company did not tell landowners "precisely where on their property the pipeline would run," yet finding no statutory authority to do so).

It would be illogical to assume that the pleading requirements would set a higher standard than the substantive statutory requirements of the "Natural Gas Act" ("NGA"). Also, I believe it is important to remember that part of the reason that ETNG cannot provide a more specified determination of the location of the easements is clue to the fact that the defendants have denied them the opportunity to. survey their land to determine possible obstructions.

It is import to note that the landowners also are protected by the necessities of procedure. FERC has granted an easement to ETNG to lay pipeline across specific property. It is clear from the order that any changes to the proposed route or requirements will have to be approved by the Director of the Office of Energy Projects. To obtain a new easement, ETNG will have to start fresh, getting the approval of FERC, negotiating with the landowner, and then beginning a new condemnation proceeding if it is unable to come to terms with the landowner. As ETNG noted during the hearing, in that case the defendants will still receive their due process and will likely get paid twice for one pipeline.

B. Failure to comply with state substantive law

The question of whether state or federal law governs appears confusing, but I believe it is relatively easy to disentangle. The defendant's contend that Virginia has laid down statutory provisions to protect the rights of landowners. They further argue that these laws do not directly conflict with the implementation and purpose of the NGA, so they should be followed according to § 717f(h) of that Act which states: "[T]he practice and procedure in any action or proceeding for [the purpose of eminent domain] in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action

or proceeding in the courts of the State where the property is situated ...." 29 U.S.C. § 717f(h). As such, the defendants claim that before it can successfully seek condemnation under Rule 71A, ETNG must follow Virginia law which requires, among other things, that the landowner be allowed to accompany the company's surveyor and that the condemnor provide the landowner with a copy of the appraisal and explain how valuation was determined.[2]

While I can find no evidence of this or any other federal court addressing these specific statutory requirements, there is plenty of case law that disputes the defendants' assertion that ETNG must follow Virginia law. The defendants admit that Rule 71A preempts state procedural law, but they insist that state substantive law must be followed under the NGA. The question, then, is whether Rule 71A, which was enacted in 1951, supercedes the "practice and procedure" requirement of the earlier-enacted NGA. Case law clearly states that it does.

In *Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 4 n.2 (1984), the U.S. Supreme Court held that Rule 71A superceded the Condemnation Act. Since that time, courts considering the issue have held the NGA to the same standard. *See Southern Natural Gas*, 197 F.3d at 1374 ("Rule 71A, not the practice and procedure language of § 717f(h) and not state law, governs the proceedings in the instant case); *Alabama Power Co. v. 1354.02 Acres, More or Less, of Land in Randolph County, Ala.*, 709 F.2d 666 (11th Cir. *1983);USG Pipeline*, 1 F. *Supp.* 2d *at 827; see also* Rule 71A, Advisory Committee Notes ("Rule 71A . . . supplants all statutes proscribing a different procedure."). As the court stated in *Guardian Pipeline*, "state and local laws cannot be

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[2] The defendants spent the majority of the rest of their brief explaining how by ignoring Virginia law the court would be creating improper federal common law. I believe that this argument only distracts from the true issue and its resolution.

used to prohibit or unreasonably delay the construction of the approved pipeline." 210 F. Supp. 2d at 975.

In considering the issue of whether defendants were entitled to a trial before a commission in accordance with Virginia law, the Fourth Circuit stated that "state law is made applicable only when no federal law is applicable," and the court found "no hiatus in federal law requiring resort to the laws of Virginia." *Washington Metro. Area Transit Auth. v. Two Parcels ofLand in Fairfax County, Virginia,* 569 F.2d 816 (4th Cir. 1978). More recently, one district court from this circuit has stated that federal law "governs all procedural and most substantive matters arising in a federal condemnation proceeding." *United States v. 7,216 50 Acres of Land,* 507 F. Supp. 228, 235 (D.C.S.C. 1980). Other federal courts have considered the question of the application of state law under the NGA and have routinely held that clause has been preempted by Rule 71A. *See Southern National Gas Co. V. Land, Cullman County,* 197 F.3d *1368, 1372* (11th Cir. 1999); *Scully v. U. S.,* 409 F.2d 1061 (10th Cir. 1969) (stating that determination of type and extent of property interest taken upon exercise of federal power of eminent domain is governed by federal law); *Northwest Pipeline Corp. v. The 20' x 1,430' pipeline Right of Way easement,* 197 F. Supp. 2d 1241, 1244 (RD. Wash. 2002) ("[T]he explicit language of the Natural Gas Act regarding the use of state law has been repealed by implication through the adoption of Rule 71A . . . "); *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement,* 747 F. Supp. *401,* 404 (N.D. Ohio 1990) ("The Court concludes that the State of Ohio has no power to regulate, directly or indirectly, a natural gas storage field certified by the Federal Energy Regulation Commission.")..

In *Natural Gas Pipeline Co. of America v. Iowa State Commerce Comm'n,* 369 F. Supp. 156 (S.D. Iowa 1974), the court considered a case with facts very similar to those presented here. In that case, a private gas company sought

declaratory and injunctive relief against enforcement of a state statute that governed permit procedures for underground pipelines. The statute in question required all pipeline companies to hold informational hearings for all affected landowners at least 30 days prior to requesting a permit from the State and prohibited negotiations for real estate before the hearings had taken place. The court determined that the State's informational meeting requirement could not apply to companies who were seeking eminent domain under federal procedures.[3] *Id.* at 160.

The defendants claim that by rejecting their argument that individual landowners must be given the opportunity to accompany ETNG appraisers, this court would be improperly establishing a federal common law instead of relying on state law. To support their argument, the rely on *Georgia Power Co. v. 138.30 Acres of Land,* 617 F.2d 1112 (5th Cir. 1980), and *Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement,* 962 F.2d 1192 (6th Cir. 1992), two cases in which the court reversed a district court's decision due to the fact that the judge-appointed commission had based its compensation valuation on federal common law and not the relevant state law. In each case the courts noted that the statute did not specify the proper rule of decision and iterated that it was thus the duty of the judiciary to formulate a usable valuation policy. Relying on the principles of federalism, the courts determined that state law should be used "unless it is shown that legislative intent or other sufficient reasons exist to displace state law with federal common law." *Georgia Power,* 617 F.2d at 1115-16.

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[3] The court did not specifically rule on the breadth and constitutionality of the statute as it applied to federal eminent domain procedures, but recognized that the State had conceded that if the statute were construed to include federal procedure then it would violate the Interstate Commerce and Supremacy Clauses of the United States Constitution. *Id.* at 160.

While I agree that the principles of federalism should be protected whenever possible, there are important differences between these two cases and the instant situation that negate the need to resort to creation of a federal common law. First, in each of these cases the issue dealt with compensation, not with the power to condemn. Second, and most important, the courts in these cases were forced to pick some valuation method, while here the court is faced with the choice of adding new and unnecessary procedure. To put is simply, due to a hole in the statute the courts in the relied-upon cases had to adopt some method of valuation or they could not properly compensate the landowners. This court is faced with no such dilemma. Here the defendants are seeking to add a new and supplementary duty to ETNG's grant of eminent domain, something I refuse to do. By rejecting the defendants' argument this court is not choosing federal common law over state law, but is merely refusing to graft a new requirement to those mandated by FERC. See Wright, Miller & Kane, *8 Federal Practice & Procedure 2d*, § 3042, pp. 193-94 (1997) ("Federal condemnation - as contrasted with cases invoking a state's power of eminent domain - is governed by federal law, and state decisions and statutes are neither controlling nor persuasive. This applies to the power of condemnation, [and] the procedure for condemnation ....").

Rule 71A was enacted to make uniform eminent domain procedure in the federal courts. To graft state rules on to it would frustrate the purpose of the statute. The defendants have suggested that refusal to enforce state substantive law could lead to the inequitable results in a situation where one landowner could be forced to defend against condemnation in a state court with the protective requirements of state law, while his neighbor could be taken to federal court by the same plaintiff and lose those state protections. While this may be true, there are uniformity benefits to refusing to rely on state law in

condemnation actions under the NGA. In a case such as this, where the pipeline extends through more than one state, federal court defendants will avoid the situation where their substantive rights are determined by which side of the border they live on. I do not believe that striking down the established rule would result in a less uniform distribution of rights.

In light of these cases, there appears to be adequate authority to support the premise that the defendants cannot stop ETNG's condemnation action on the grounds that the plaintiff did not comply with Virginia state law.[4]

C. Failure to negotiate in good faith

Some of the defendants have argued that the motion should be dismissed because of the failure of ETNG to negotiate in good faith with the landowners before commencing this action. Section 717f(h) of the NGA states the condemnor must demonstrate that it "cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for" the interest of the sought property. 15 U.S.C. 717f(h). Some courts have translated this to require that the holder of a FERC certificate negotiate in good faith with the appropriate owners.[5] *See, e.g., USG Pipeline Co.*, 1 F. *Supp.* 2d at 822; *Transcon. Gas Pipe Line Corp.*, 745 F. Supp. at 369. What actions are necessary to meet this standard are unclear, and the defendants have been unable to point to any federal case where

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[4] The defendants are correct in stating that the state law does have a role to play in the protection of property rights. State law defines the existence and extent of any property interests, but once an interest is determined federal law dictates how the property may be attached. *See US. v. Rollin*, 264 F.3d 391, 423-24 (4th Cir. 2001).

[5] The defendants here do not point to the NGA, but instead rely on § 25-46.5(A) of the Code of Virginia. As discussed above, federal law controls these issues.

condemnation was delayed or denied due to a question over good faith negotiations. *See Guardian Pipeline, 210* F. Supp. at 973 (noting "judicial gloss" of good faith negotiation and lack of enforcement).

In *USG Pipeline,* the court first suggested that the existence of *the* suit itself proved the inability of the plaintiff to acquire the property by negotiation. The plaintiff detailed the actions it took with regard to negotiations during an evidentiary hearing, which included testimony from field agents on how they had valued the land and on the "discussions" they had with each of the owners. The court noted that the complaints of the landowners were that the path of the easement was uncertain, the compensation offered was too low, the easement would devalue the surrounding land, they were opposed on principle to the pipeline, they did not believe in the government's power of eminent domain, or they just thought they were given "take it or leave it" offers. The court noted that despite their concerns, the owners did not attempt to ascertain the pipeline route and generally did not make counteroffers or follow up at all on the company's offer. The court found that the company had made reasonable efforts to ascertain local land values and negotiate with the landowners.

The defendants point to the letters received from ETNG that seem to be nothing more than a "column of seemingly randomly-chosen dollar figures," and claims that there is no hint of valuation procedures taken that would allow the owners to negotiate. They also claim that future letters changed the amount offered and the shape of the easement. The plaintiff contends that it has more than met the necessary statutory requirements and have settled with over 95% of the landowners, but the remaining defendants

are just seeking to force ETNG to abandon its project.[6] It would seem that in each case ETNG has made at least one offer to the defendant and the defendant has refused that offer.[7] While there is some dispute over what the offers covered and how ETNG arrived at the asked figure, there is no indication that ETNG was acting in anything less than good faith. The easement measurements were delineated in the provided plat, and it seems to me that the only figure the defendants needed was not the value an appraiser placed on the land, but was instead the value the defendants themselves valued it. Put simply, ETNG could have meticulously detailed how it arrived at its offer price, but if the landowner felt the land was worth more than the asked for amount, he or she would not sell.

While I am of the opinion that ETNG has established that it has negotiated with the defendants in good faith, I do not believe that the plaintiff should be held to this standard. In the recent case of *Kansas Pipeline Co. v. A 200 Foot by 250 Foot Piece of Land,* 210 F. Supp. 2d 1253 (D. Kan. 2002), the court examined the good faith requirement and found it to be lacking. *Kansas Pipeline* concerned the renewal of a year-to-year lease by a natural gas pipeline company that allowed it to maintain two dehydration units on the landowner's property. The company inadvertently neglected to renew its lease and the landowners informed it that the lease was terminated. After failing to obtain a new lease or to buy the property from *the* owners, the company, which held a FERC certificate for the line, exercised its power of eminent domain. As its defense, the landowner

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[6] Certain defendants point to the requirement under Virginia law that "imposes an obligation of good faith in [the] performance or enforcement" of any contract. Va. Code § 8.1-203 (Michie 2001). As I have state above, however, I believe that the substantive issues in this case are controlled by federal law.

[7] Many of the current defendants dispute ETNG's right to condemn their property making negotiation difficult if not impossible.

claimed that the company had failed to negotiate in good faith. The court disagreed, finding that those courts that had adopted the good faith requirement had failed to explain why they had done so. The court noted that nothing in the NGA requires the holder of a FERC certificate to negotiate in good faith, just that the party seeking to condemn "cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for" the property interest. *Id.* at 1257 (quoting 15 U.S.C. § 717f(h)).

I find the *Kansas Pipeline* Court's reasoning to be persuasive. Nothing in the NGA or Rule 71A requires a potential condemnor to negotiate in good faith. The defendant's themselves have recognized that "one is to look first at [the statute's] language .... Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *North Dakota v. United States,* 460 U.S. 300, 312 (1983). Other than their misplaced reliance on state law, the defendants have failed to give me a reason to read a good faith requirement into the statutory scheme. ETNG has established that it has been unable to acquire the needed property by contract, and that is sufficient to meet the burden established by the NGA.

D. Claims for Individualized Relief

Several of the defendants have included claims relating to the "unique characteristics" of their property, the amount and timing of compensation, and the requirements made by FERC in the Certificate. The sole jurisdiction of the district court in this matter is "to evaluate the scope of the certificate and to order condemnation of the property as authorized in the certificate." *Tennessee Gas Pipeline Co. v. 104 Acres of Land More or Less, in Providence County,* 749 F. Supp. 427 (D.R.I. 1990). These issues do not relate to the ability of ETNG to obtain possession of the property, but instead question the appropriateness and breadth of the FERC

Certificate or the amount of compensation. The claims falling in the former category, such as complaints about the location of easement, the timing of blasting, or the placement of erosion controls, are solely the province of FERC, and should have been brought before the Commission during the notice and comment hearings. Any provisions which are unique to a particular parcel of property will be dealt with in the order for immediate possession. The complaints dealing with compensation should be reserved until the court-appointed Compensation Commission begins its investigation.

Once FERC made its order, the only power this court has is to ensure it is properly enforced. As shown above, the order itself is as comprehensive as it is final. This court has neither the desire nor the ability to rule on the necessity of the Certificate or the appropriateness of the orders. *See* 15 U.S.C. § 717r(b) (limiting review of FERC order to circuit courts of appeal). By granting the Certificate, FERC has

> found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity ...

15 U.S.C. § 717f(e). Due to the exhaustive nature of the FERC certification process, the jurisdiction of this court is limited to enforcing the order as written. This court cannot alter FERC's order, it can only allow or deny enforcement. Any

complaints concerning the means and timing as laid out in the Certificate must therefore be denied.

E. Constitutional violations

The landowners of one parcel argue that ETNG should not petition this court for a remedy based on "the failure of the Natural Gas Act," but should instead lobby Congress. They quote the Takings Clause of the Fifth Amendment and *Zinermon v. Burch*, 494 U.S. 113, 132 (1990) for the proposition that "in situations where the State feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of the post-deprivation remedy to compensate for the taking."

These defendants also make a Due Process argument that before a post-deprivation remedy satisfies due process, the following conditions must be met: (1) that the deprivation is unpredictable; (2) that pre-deprivation process is impossible; and (3) that the state actor's conduct is unauthorized. Memo. at 3 (quoting *Charbonnet v. Lee*, 951 F.2d 638, 642 (5th Cir. 1992). They contend that since the NGA process is predictable, pre-deprivation process is possible, and since ETNG's conduct is authorized under the NGA, then immediate possession is improper. Their arguments rely on a lack of process, yet I have held hearings on this issue. The only assumption that can be made is that the defendants here are really making an argument that possession is improper *before* compensation is awarded.

The U.S. Supreme Court recently reaffirmed the government's ability to condemn private land in *Brown v. Legal Foundation of Washington*, 2003 WL 1523550 (March 26, 2003), by stating: "While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation'

must be paid to the owner" Taking property is in itself not unconstitutional until compensation is denied. *Shooting Point, L.L.C. v. Cumming*, 238 F. Supp. 2d 729 (E.D. Va. 2002). Therefore, "a takings claim becomes ripe only after a property owner has availed himself of all available state procedures and has been denied." *Id.* There is no Fifth Amendment requirement that the compensation be paid before or contemporaneous to the taking, just as long as the payment is reasonable, certain, and adequate. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("The Fifth Amendment does not require that compensation precede the taking."); *Cosme Rosado v. Serrano Rodriguez*, 96 F. Supp. 2d 117, 122 (D.P.R. 2002); *Johnson v. U.S.*, 208 F.R.D. 148, 155 (W.D. Tex. 2001); *US West Communications, Inc. v. Minnesota Public Utilities Corn'n* , 55 F. Supp. 2d 968, 989 (D. Minn. 1999). All that is required to satisfy due process concerns here is that there be some sort of pre-deprivation hearing. *Cosme Rosado 96* F. Supp. 2d at 122.

All of the requirements for a constitutional taking have been met in this case. The defendants have received ample process, such as the hearing incident to this motion, and the bond posted by the plaintiffs provides assurance that compensation will be paid once the Commission has had time to properly consider the issue. I find, then, that the defendants constitutional rights have been adequately protected.

III. Conclusion

It appears that the plaintiff has finally reached as stage where it can begin to implement the powers granted by FERC. As the defendants have been unable to provide any sound reason why I should not enforce the plaintiff's FERC Certificate, I find that ENTG has established its right to exercise eminent domain over the defendants' property as outlined in the Certificate. The plaintiff's motion for

immediate possession will be GRANTED and an appropriate order entered.

/s/ Jackson L. Kiser
Senior United States District Judge

United States Court of Appeals,
Fourth Circuit.

EAST TENNESSEE NATURAL GAS COMPANY, Plaintiff-Appellee,
v.
John F. SAGE; Linda K. Sage, Defendants-Appellants, (CA-02-107-4)
and
1.20 Acres In Wythe County, Virginia; Mary Casel, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company, Plaintiff-Appellee,
v.
Margaret Clanton, Defendant-Appellant, CA-02-114-4
and
.28 Acres In Henry County, Virginia; Lucy Clark, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company, Plaintiff-Appellee,
v.
Scott A. Fontaine; Lillie M. Fontaine, Defendants-Appellants, CA-02-120-4
and
2.09 Acres In Henry County, Virginia; Lucy Clark, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company, Plaintiff-Appellee,
v.
Alva Holland, Defendant-Appellant, CA-02-123-4
and
.54 Acres In Henry County, Virginia; Janet M. Holland; Lucy Clark, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,

Plaintiff-Appellee,
v.
Maynard R. Joyce, Defendant-Appellant,
CA-02-125-4
and
2.26 Acres In Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Ervin L. Frazier, Jr., Defendant-Appellant,
CA-02-126-4
and
1.02 Acres in Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Barbara G. Vass; Dossie G.V. Hall, a/k/a Dossie Shockley Vass, Defendants-Appellants, CA-02-128-4
and
1.59 Acres In Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Layton Russell Hancock; John Wendell Hancock; Sonia Lucille Easter; Una Faye Saunders; Wayne Dwight Hancock; Heirs Of Royal Early Hancock, Defendants-Appellants,
and
2.57 Acres In Carroll County, Virginia; John Doe, et al.; Unknown Owners;
Josephine H. Powers; Rudolph Hancock; Alene Sumner; James F. Hancock;

Talford Clay Hancock; Thomas Kenneth Hancock;
Averette Early Hancock; Jane
A. Harrison, County Assessor, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
H. Wade Baker; Lola W. Baker,
Defendants-Appellants, (CA-02-132-4)
and
1.91 Acres In Carroll County, Virginia; John Doe,
et al.; Unknown Owners;
Jane A. Harrison, County Assessor, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Gregory L. Seibert, Defendant-Appellant,
(CA-02-133-4)
and
.45 Acres In Carroll County, Virginia; Jane A.
Harrison; John Doe, et al.;
Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Robin Marie Seibert; Gregory L. Seibert,
Defendants-Appellants, (CA-02-134-4)
and
.61 Acres In Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Helen E. Melton; Charlotte A. Edwards,
Defendants-Appellants, (CA-02-135-4)
and
Jane A. Harrison, County Assessor; John Doe, et
al.; Unknown Owners; 4.76
Acres In Carroll County, Virginia, Defendants.
East Tennessee Natural Gas Company,

Plaintiff-Appellee,
v.
Ralph D. Howell; Mabel Fulcher,
Defendants-Appellants, (CA-02-138-4)
and
Rose C. Howell; John Doe, et al.; C. Jerry Love,
Commissioner of Revenue;
Unknown Owners; 3.18 Acres In Patrick County,
Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Melvin A. Thomas, Defendant-Appellant,
(CA-02-140-4)
and
1.40 Acres In Patrick County, Virginia; John Doe,
et al.; C. Jerry Love,
Commissioner of Revenue; Unknown Owners,
Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
John M. Lewis; Comelia A. Lewis,
Defendants-Appellants, (CA-02-142-4)
and
C. Jerry Love, Commissioner of Revenue; John
Doe, et al.; Unknown Owners; .
37 Acres In Patrick County, Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Earl R. Potter; Joan A. Potter,
Defendants-Appellants, (CA-02-145-4)
and
C. Jerry Love, Commissioner of Revenue; John
Doe, et al.; Unknown Owners; .
60 Acres In Patrick County, Virginia, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.

Jerry S. Thomas; Betty B. Thomas,
Defendants-Appellants, (CA-02-146-4)
and
3.04 Acres In Patrick County, Virginia; John Doe,
et al.; Unknown Owners; C.
Jerry Love, Commissioner of Revenue, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Nancy U. Stanley, Defendant-Appellant,
(CA-02-150-4)
and
3.62 Acres In Patrick County, Virginia; C. Jerry
Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Otra Martin; Edna Lou Martin Smart; Ellen M.
Fulcher; Harvey Glenn Fulcher,
Defendants-Appellants, (CA-02-153-4)
and
3.81 Acres In Patrick County, Virginia; C. Jerry
Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Robert E. Meadows; Marion C. Meadows,
Defendants-Appellants, (CA-02-155-4)
and
.94 Acres In Patrick County, Virginia; C. Jerry
Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.

William Troy Strickland; Susan M. Strickland,
Defendants-Appellants, (CA-02-
160-4)
and
1.13 Acres In Patrick County, Virginia; C. Jerry
Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
James A. Keesee; Joanne Richmond Keesee,
Defendants-Appellants, (CA-02-168-4)
and
1.58 Acres In Patrick County, Virginia; C. Jerry
Love, Commissioner of
Revenue; John Doe, et al.; Unknown Owners,
Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Thomas C. Williams, Jr.; Jeannie B. Williams,
Defendants-Appellants, (CA-02-
185-4)
and
3.27 Acres In Wythe County, Virginia; Mary
Casel, Commissioner of Revenue;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Anissa J. Brady, a/k/a Anissa Holland,
Defendant-Appellant, (CA-02-197-4)
and
.65 Acres In Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.

Charles K. Webb; Lena Webb,
Defendants-Appellants, (CA-02-198-4)
and
.64 Acres In Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Calvin Hugh Webb; Linvol Oscar Webb; Wendell
Wayne Webb, Defendants-
Appellants, (CA-02-202-4)
and
3.38 Acres In Carroll County, Virginia; John Doe,
et al.; Jane A. Harrison,
County Assessor; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Alva Jackson Horton; Heath Webb,
Defendants-Appellants, (CA-02-203-4)
and
1.60 Acres In Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
George Lewis Webb; Edward Paul Webb; Roger
Lee Webb; Joel Ray Webb,
Defendants-Appellants, (CA-02-208-4)
and
.30 Acres In Carroll County, Virginia; Jane A.
Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Dorothea W. Bryant, Defendant-Appellant,
(CA-02-211-4)

and

1.23 Acres In Carroll County, Virginia; Jane A. Harrison, County Assessor;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Clyde Holland; Shirley Holland,
Defendants-Appellants, (CA-02-212-4)
and
5.2 Acres in Henry County, Virginia; Lucy Clark, Commissioner of Revenue;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
L.J. Rector; Charis Jean Rector; Johnny J. Rector; Joe Rector, Defendants-
Appellants, (CA-02-216-4)
and
3.98 Acres In Smyth County, Virginia; Richard Walker, Commissioner of
Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Fred Tolley; Guida Tolley, Defendants-Appellants, (CA-02-218-4)
and
4.0 Acres In Wythe County, Virginia; Mary Casel, Commissioner of Revenue;
John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
James Fogelsong; Glen Stuart Fogelsong,
Defendants-Appellants, (CA-02-221-4)

and
2.64 Acres In Wythe County, Virginia; Mary Casel, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff-Appellee,
v.
Weaver Enterprises, Incorporated,
Defendant-Appellant, (CA-02-182-4)
and
11.42 Acres In Wythe County, Virginia; Mary Casel, Commissioner of Revenue; John Doe, et al.; Unknown Owners, Defendants.
East Tennessee Natural Gas Company,
Plaintiff -Appellee,
v.
Ronnie Lynn Goforth; Susan D. Goforth; 3.51 Acres/Wythe County, (CA-02-215-4)
Defendants-Appellants,
and
Mary Casel, Commissioner of Revenue; John Doe, et al.; Unknown Owners,
Defendants.

Nos. 03-1708 through 03-1741; 03-1797

Filed: May 14, 2004.
[ENTERED: May 14, 2004]

On Petition for Rehearing and Rehearing En Banc

Appellants filed petitions for rehearing and rehearing en banc.

The Panel voted to deny rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Judge Widener voted to rehear the case en banc, and Judges

Niemeyer, Luttig, Michael, Motz, Traxler, Gregory, Shedd and Duncan voted against rehearing en banc. Chief Judge Wilkins and Judges Wilkinson, Williams and King are disqualified.

The Court denies the petition for rehearing and rehearing en banc. Entered at the direction of Judge Michael for the Court.

U.S. Const. Art. I § 1

Section 1. Legislative Power Vested in Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

10 U.S.C.A. § 2538

§ 2538. Industrial mobilization: orders; priorities; possession of manufacturing plants; violations

(a) Ordering authority.--In time of war or when war is imminent, the President, through the head of any department, may order from any person or organized manufacturing industry necessary products or materials of the type usually produced or capable of being produced by that person or industry.

(b) Compliance with order required.--A person or industry with whom an order is placed under subsection (a), or the responsible head thereof, shall comply with that order and give it precedence over all orders not placed under that subsection.

(c) Seizure of manufacturing plants upon noncompliance.--In time of war or when war is imminent, the President, through the head of any department, may take immediate possession of any plant that is equipped to manufacture, or that in the opinion of the head of that department is capable of being readily transformed into a plant for manufacturing, arms or ammunition, parts thereof, or necessary supplies for the armed forces if the person or industry owning or operating the plant, or the responsible head thereof, refuses--

(1) to give precedence to the order as prescribed in subsection (b);

(2) to manufacture the kind, quantity, or quality of arms or ammunition, parts thereof, or necessary supplies, as ordered by the head of such department; or

(3) to furnish them at a reasonable price as determined by the head of such department.

(d) **Use of seized plant.**--The President, through the head of any department, may manufacture products that are needed in time of war or when war is imminent, in any plant that is seized under subsection (c).

(e) **Compensation required.**--Each person or industry from whom products or materials are ordered under subsection (a) is entitled to fair and just compensation. Each person or industry whose plant is seized under subsection (c) is entitled to a fair and just rental.

(f) **Criminal penalty.**--Whoever fails to comply with this section shall be imprisoned for not more than three years and fined under title 18.

10 U.S.C.A. § 2663

§ 2663. Acquisition

(a) The Secretary of a military department may have proceedings brought in the name of the United States, in a court of proper jurisdiction, to acquire by condemnation any interest in land, including temporary use, needed for--

(1) the site, construction, or operation of fortifications, coast defenses, or military training camps;

(2) the construction and operation of plants for the production of nitrate and other compounds, and the manufacture of explosives or other munitions of war; or

(3) the development and transmission of power for the operation of plants under clause (2).

(b) In time of war or when war is imminent, the United States may, immediately upon the filing of a petition for condemnation under subsection (a), take and use the land to the extent of the interest sought to be acquired.

(c) The Secretary of the military department concerned may contract for or buy any interest in land, including temporary use, needed for any purpose named in subsection (a), as soon as the owner fixes a price for it and the Secretary considers that price to be reasonable.

(d) The Secretary of the military department concerned may accept for the United States a gift of any interest in land, including temporary use, for any purpose named in subsection (a).

15 U.S.C.A. § 717f

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is

unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of

emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of--

> **(A)** natural gas sold by the producer to such person; and
>
> **(B)** natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c) (1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform

to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant

certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

16 U.S.C.A. § 425a

§ 425a. Acquisition of lands

The Secretary of the Interior is authorized to cause condemnation proceedings to be instituted in the name of the United States under the provisions of section 3113 of Title 40, to acquire title to the lands, interests therein, or rights pertaining thereto within the said Fredericksburg and Spotsylvania County Battle Fields Memorial, authorized to be acquired in section 425 of this title, and the United States shall be entitled to immediate possession upon the filing of the petition in condemnation in the United States District Court for the Eastern District of Virginia: *Provided,* That when the owner of such lands, interests therein, or rights pertaining thereto shall fix a price for the same, which in the opinion of the commission, referred to in section 425c of this title, and the Secretary of the Interior, shall be reasonable, the Secretary may purchase the same without further delay: *Provided further,* That the Secretary of the Interior is authorized to accept on behalf of the United States, donations of lands, interests therein or rights pertaining thereto required for the said Fredericksburg and Spotsylvania County Battle Fields Memorial: *And provided further,* That no public money shall be expended for title to any lands until a written opinion of the Attorney General shall be had in favor of the validity of title thereto.

16 U.S.C.A. § 430k

§ 430k. Condemnation proceedings; purchase without condemnation; acceptance of donations of land

The Secretary of the Interior is authorized to cause condemnation proceedings to be instituted in the name of the United States under the provisions of section 3113 of Title 40, to acquire title to the lands, interests therein, or rights pertaining thereto within the said battlefield, and the United States shall be entitled to immediate possession upon the filing of the petition in condemnation in the United States District Court for the District of Maryland: *Provided,* That when the owner of such lands, interests therein, or rights pertaining thereto shall fix a price for the same, which, in the opinion of the Secretary of the Interior, shall be reasonable, the Secretary may purchase the same without further delay: *Provided further,* That the Secretary of the Interior is authorized to accept, on behalf of the United States, donations of lands, interests therein, or rights pertaining thereto required for the battlefield: *And provided further,* That title and evidence of title to lands and interests therein acquired for said battlefield shall be satisfactory to the Secretary of the Interior.

28 U.S.C.A. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.A. § 2072

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

33 U.S.C.A. § 594

§ 594. *When* immediate possession of land may be taken

Whenever the Secretary of the Army, in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or rights of way needed for a work of river and harbor improvements duly authorized by Congress, the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights-of-way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress: *Provided,* That certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted. The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. In every case the proceedings in condemnation shall be diligently prosecuted on the part of the United States in order that such compensation may be promptly ascertained and paid.

40 U.S.C. § 3113

§ 3113. Acquisition by condemnation.

An officer of the Federal Government authorized to acquire real estate for the erection of a public building or for other public uses may acquire the real estate for the Government by condemnation, under judicial process, when the officer believes that it is necessary or advantageous to the Government to do so. The Attorney General, on application of the officer, shall have condemnation proceedings begun within 30 days from receipt of the application at the Department of Justice.

40 U.S.C.A. § 3114

§ 3114. Declaration of taking

(a) Filing and content.--In any proceeding in any court of the United States outside of the District of Columbia brought by and in the name of the United States and under the authority of the Federal Government to acquire land, or an easement or right of way in land, for the public use, the petitioner may file, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the land described in the petition, declaring that the land is taken for the use of the Government. The declaration of taking shall contain or have annexed to it--

(1) a statement of the authority under which, and the public use for which, the land is taken;

(2) a description of the land taken that is sufficient to identify the land;

(3) statement of the estate or interest in the land taken for public use;

(4) a plan showing the land taken; and

(5) a statement of the amount of money estimated by the acquiring authority to be just compensation for the land taken.

(b) Vesting of title.--On filing the declaration of taking and depositing in the court, to the use of the persons entitled to the compensation, the amount of the estimated compensation stated in the declaration--

(1) title to the estate or interest specified in the declaration vests in the Government;

(2) the land is condemned and taken for the use of the Government; and

(3) the right to just compensation for the land vests in the persons entitled to the compensation.

(c) **Compensation.**--

(1) **Determination and award.**--Compensation shall be determined and awarded in the proceeding and established by judgment. The judgment shall include interest, in accordance with section 3116 of this title, on the amount finally awarded as the value of the property as of the date of taking and shall be awarded from that date to the date of payment. Interest shall not be allowed on as much of the compensation as has been paid into the court. Amounts paid into the court shall not be charged with commissions or poundage.

(2) **Order to pay.**--On application of the parties in interest, the court may order that any part of the money deposited in the court be paid immediately for or on account of the compensation to be awarded in the proceeding.

(3) **Deficiency judgment.**--If the compensation finally awarded is more than the amount of money received by any person entitled to compensation, the court shall enter judgment against the Government for the amount of the deficiency.

(d) **Authority of court.**--On the filing of a declaration of taking, the court--

(1) may fix the time within which, and the terms on which, the parties in possession shall be required to surrender possession to the petitioner; and

(2) may make just and equitable orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges.

(e) **Vesting not prevented or delayed.**--An appeal or a bond or undertaking given in a proceeding does not prevent or delay the vesting of title to land in the Government.

40 U.S.C.A. § 3118

§ 3118. Right of taking as addition to existing rights

The right to take possession and title in advance of final judgment in condemnation proceedings as provided by section 3114 of this title is in addition to any right, power, or authority conferred by the laws of the United States or of a State, territory, or possession of the United States under which the proceeding may be conducted, and does not abrogate, limit, or modify that right, power, or authority.

42 U.S.C.A. § 5196

§ 5196. Detailed functions of administration

(a) In general

In order to carry out the policy described in section 5195 of this title, the Director shall have the authorities provided in this section.

(b) Federal emergency response plans and programs

The Director may prepare Federal response plans and programs for the emergency preparedness of the United States and sponsor and direct such plans and programs. To prepare such plans and programs and coordinate such plans and programs with State efforts, the Director may request such reports on State plans and operations for emergency preparedness as may be necessary to keep the President, Congress, and the States advised of the status of emergency preparedness in the United States.

(c) Delegation of emergency preparedness responsibilities

With the approval of the President, the Director may delegate to other departments and agencies of the Federal Government appropriate emergency preparedness responsibilities and review and coordinate the emergency preparedness activities of the departments and agencies with each other and with the activities of the States and neighboring countries.

(d) Communications and warnings

The Director may make appropriate provision for necessary emergency preparedness communications and for

dissemination of warnings to the civilian population of a hazard.

(e) Emergency preparedness measures

The Director may study and develop emergency preparedness measures designed to afford adequate protection of life and property, including--

(1) research and studies as to the best methods of treating the effects of hazards;

(2) developing shelter designs and materials for protective covering or construction; and

(3) developing equipment or facilities and effecting the standardization thereof to meet emergency preparedness requirements.

(f) Training programs

(1) The Director may--

(A) conduct or arrange, by contract or otherwise, for training programs for the instruction of emergency preparedness officials and other persons in the organization, operation, and techniques of emergency preparedness;

(B) conduct or operate schools or including the payment of travel expenses, in accordance with subchapter I of chapter 57 of Title 5, and the Standardized Government Travel Regulations, and per diem allowances, in lieu of subsistence for trainees in attendance or the furnishing of subsistence and quarters for trainees and instructors on terms prescribed by the Director; and

(C) provide instructors and training aids as necessary.

(2) The terms prescribed by the Director for the payment of travel expenses and per diem allowances authorized by this subsection shall include a provision that such payment shall not exceed one-half of the total cost of such expenses.

(3) The Director may lease real property required for the purpose of carrying out this subsection, but may not acquire fee title to property unless specifically authorized by law.

(g) Public dissemination of emergency preparedness information

The Director may publicly disseminate appropriate emergency preparedness information by all appropriate means.

(h) Interstate emergency preparedness compacts

(1) The Director may--

(A) assist and encourage the States to negotiate and enter into interstate emergency preparedness compacts;

(B) review the terms and conditions of such proposed compacts in order to assist, to the extent feasible, in obtaining uniformity between such compacts and consistency with Federal emergency response plans and programs;

(C) assist and coordinate the activities under such compacts; and

(D) aid and assist in encouraging reciprocal emergency preparedness legislation by the States which will permit the furnishing of mutual aid for emergency preparedness purposes in the event of a hazard which cannot be adequately met or controlled by a State or political subdivision thereof threatened with or experiencing a hazard.

(2) A copy of each interstate emergency preparedness compact shall be transmitted promptly to the Senate and the House of Representatives. The consent of Congress is deemed to be granted to each such compact upon the expiration of the 60-day period beginning on the date on which the compact is transmitted to Congress.

(3) Nothing in this subsection shall be construed as preventing Congress from disapproving, or withdrawing at any time its consent to, any interstate emergency preparedness compact.

(i) Materials and facilities

(1) The Director may procure by condemnation or otherwise, construct, lease, transport, store, maintain, renovate or distribute materials and facilities for emergency preparedness, with the right to take immediate possession thereof.

(2) Facilities acquired by purchase, donation, or other means of transfer may be occupied, used, and improved for the purposes of this subchapter before the approval of title by the Attorney General as required by sections 3111

(3) The Director may lease real property required for the purpose of carrying out the

provisions of this subsection, but shall not acquire fee title to property unless specifically authorized by law.

(4) The Director may procure and maintain under this subsection radiological, chemical, bacteriological, and biological agent monitoring and decontamination devices and distribute such devices by loan or grant to the States for emergency preparedness purposes, under such terms and conditions as the Director shall prescribe.

(j) Financial contributions

(1) The Director may make financial contributions, on the basis of programs or projects approved by the Director, to the States for emergency preparedness purposes, including the procurement, construction, leasing, or renovating of materials and facilities. Such contributions shall be made on such terms or conditions as the Director shall prescribe, including the method of purchase, the quantity, quality, or specifications of the materials or facilities, and such other factors or care or treatment to assure the uniformity, availability, and good condition of such materials or facilities.

(2) No contribution may be made under this subsection for the procurement of land or for the purchase of personal equipment for State or local emergency preparedness workers.

(3) The amounts authorized to be contributed by the Director to each State for organizational equipment shall be equally matched by such State from any source it determines is consistent with its laws.

(4) Financial contributions to the States for shelters and other protective facilities shall be determined by taking the

amount of funds appropriated or available to the Director for such facilities in each fiscal year and apportioning such funds among the States in the ratio which the urban population of the critical target areas (as determined by the Director) in each State, at the time of the determination, bears to the total urban population of the critical target areas of all of the States.

(5) The amounts authorized to be contributed by the Director to each State for such shelters and protective facilities shall be equally matched by such State from any source it determines is consistent with its laws and, if not matched within a reasonable time, the Director may reallocate such amounts to other States under the formula described in paragraph (4). The value of any land contributed by any State or political subdivision thereof shall be excluded from the computation of the State share under this subsection.

(6) The amounts paid to any State under this subsection shall be expended solely in carrying out the purposes set forth herein and in accordance with State emergency preparedness programs or projects approved by the Director. The Director shall make no contribution toward the cost of any program or project for the procurement, construction, or leasing of any facility which (A) is intended for use, in whole or in part, for any purpose other than emergency preparedness, and (B) is of such kind that upon completion it will, in the judgment of the Director, be capable of producing sufficient revenue to provide reasonable assurance of the retirement or repayment of such cost; except that (subject to the preceding provisions of this subsection) the Director may make a contribution to any State toward that portion of the cost of the construction, reconstruction, or enlargement of any facility which the Director determines to be directly attributable to the incorporation in such facility of any feature of construction

or design not necessary for the principal intended purpose thereof but which is, in the judgment of the Director necessary for the use of such facility for emergency preparedness purposes.

(7) The Director shall submit to Congress a report, at least annually, regarding all contributions made pursuant to this subsection.

(8) All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed with the assistance of any contribution of Federal funds made by the Director under this subsection shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 to 3144, 3146, 3147 of Title 40, and every such employee shall receive compensation at a rate not less than one and 112 times the basic rate of pay of the employee for all hours worked in any workweek in excess of eight hours in any workday or 40 hours in the workweek, as the case may be. The Director shall make no contribution of Federal funds without first obtaining adequate assurance that these labor standards will be maintained upon the construction work. The Secretary of Labor shall have, with respect to the labor standards specified in this subsection, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (5 U.S.C. App.) and section 3145 of Title 40.

(k) Sale or disposal of certain materials and facilities

The Director may arrange for the sale or disposal of materials and facilities found by the Director to be unnecessary or unsuitable for emergency preparedness purposes in the same manner as provided for excess property under the Federal Property and Administrative Services Act of 1949. Any funds received as proceeds from

the sale or other disposition of such materials and facilities shall be deposited into the Treasury as miscellaneous receipts.

50 U.S.C.A. § 82

§ 82. Procurement of ships and material during war

(a) Definitions

The word "person" as used in subsections (b) and (c) of this section shall include any individual, trustee, firm, association, company, or corporation. The word "ship" shall include any boat, vessel, submarine, or any form of aircraft, and the parts thereof. The words "war material" shall include arms, armament, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production thereof. The word "factory" shall include any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard. The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

(b) Presidential powers

In time of war the President is authorized and empowered, in addition to all other existing provisions of law:

> **First.** Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person

owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Second. Within the limit of the amounts appropriated therefor, to modify or cancel any existing contract for the building, production, or purchase of ships or war material; and if any contractor shall refuse or fail to comply with the contract as so modified the President may take immediate possession of any factory of such contractor, or any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Third. To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and, within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.

Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

(d) [FN1] Compensation for commandeered material

Whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of subsection (b) of this section, it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section 1346 or 1491 of Title 28.

[FN1] So in original. Section enacted without a subsec. (c).

50 App. U.S.C.A. § 468

§ 468. Utilization of industry

(a) Placement of orders; Congressional action; notification of committees of certain proposed payment orders, resolution of disapproval, continuity of session, computation of period; "small business" defined

Whenever the President after consultation with and receiving advice from the National Security Resources Board determines that it is in the interest of the national security for the Government to obtain prompt delivery of any articles or materials the procurement of which has been authorized by the Congress exclusively for the use of the armed forces of the United States, or for the use of the Atomic Energy Commission, he is authorized, through the head of any Government agency, to place with any person operating a plant, mine, or other facility capable of producing such articles or materials an order for such quantity of such articles or materials as the President deems appropriate, except that no order which requires payments thereunder in excess of $25,000,000 shall be placed with any person, unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed order and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such order. For purposes of the preceding sentence, the continuity of a session of Congress is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 60-day period. Any person with whom an order is placed pursuant to the

provisions of this section shall be advised that such order is placed pursuant to the provisions of this section. Under any such program of national procurement, the President shall recognize the valid claim of American shall business to participate in such contracts, in such manufactures, and in such distribution of materials, and small business shall be granted a fair share of the orders placed, exclusively for the use of the armed forces or for other Federal agencies now or hereafter designated in this section. For the purposes of this section, a business enterprise shall be determined to be "small business" if (1) its position in the trade or industry of which it is a part is not dominant, (2) the number of its employees does not exceed 500, and (3) it is independently owned and operated.

(b) Precedence of Government placed orders

It shall be the duty of any person with whom an order is placed pursuant to the provisions of subsection (a) of this section, (1) to give such order such precedence with respect to all other orders (Government or private) theretofore or thereafter placed with such person as the President may prescribe, and (2) to fill such order within the period of time prescribed by the President or as soon thereafter as possible.

(c) Failure to give precedence; Government possession

In case any person with whom an order is placed pursuant to the provisions of subsection (a) of this section refuses or fails--

> (1) to give such order such precedence with respect to all other orders (Government or private) theretofore or thereafter placed with such person as the President may have prescribed;

(2) to fill such order within the period of time prescribed by the President or as soon thereafter as possible as determined by the President;

(3) to produce the kind or quality of articles or materials ordered; or

(4) to furnish the quantity, kind, and quality of articles or materials ordered at such price as shall be negotiated between such person and the Government agency concerned; or in the event of failure to negotiate a price, to furnish the quantity, kind, and quality of articles or materials ordered at such price as he may subsequently be determined to be entitled to receive under subsection (d) of this section;

the President is authorized to take immediate possession of any plant, mine, or other facility of such person and to operate it, through any Government agency, for the production of such articles or materials as may be required by the Government.

(d) Payment of compensation by United States

Fair and just compensation shall be paid by the United States (1) for any articles or materials furnished pursuant to an order placed under subsection (a) of this section, or (2) as rental for any plant, mine, or other facility of which possession is taken under subsection (c) of this section.

(e) Application of Federal and State laws governing employees

Nothing contained in this section shall be deemed to render inapplicable to any plant, mine, or facility of which possession is taken pursuant to subsection (c) of this section

any State or Federal laws concerning the health, safety, security, or employment standards of employees.

(f) Penalties

Any person, or any officer of any person as defined in this section, who willfully fails or refuses to carry out any duty imposed upon him by subsection (b) of this section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not more than three years, or by a fine of not more than $50,000, or by both such imprisonment and fine.

(g) "Person" and "Government agency" defined

(1) As used in this section--

(A) The term "person" means any individual, firm, company, association, corporation, or other form of business organization.

(B) The term "Government agency" means any department, agency, independent establishment, or corporation in the Executive branch of the United States Government.

(2) For the purposes of this section, a plant, mine, or other facility shall be deemed capable of producing any articles or materials if it is then producing or furnishing such articles or materials or if the President after consultation with and receiving advice from the National Security Resources Board determines that it can be readily converted to the production or furnishing of such articles or materials.

(h) Rules and regulations governing steel industry; mandatory

The President is empowered, through the Secretary of Defense, to require all producers of steel in the United States to make available, to individuals, firms, associations, companies, corporations, or organized manufacturing industries having orders for steel products or steel materials required by the armed forces, such percentages of the steel production of such producers, in equal proportion deemed necessary for the expeditious execution of orders for such products or materials. Compliance with such requirement shall be obligatory on all such producers of steel and such requirement shall take precedence over all orders and contracts theretofore placed with such producers. If any such producer of steel or the responsible head or heads thereof refuses to comply with such requirement, the President, through the Secretary of Defense, is authorized to take immediate possession of the plant or plants of such producer and, through the appropriate branch, bureau, or department of the armed forces, to insure compliance with such requirement. Any such producer of steel or the responsible head or heads thereof refusing to comply with such requirement shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than three years and a fine not exceeding $50,000.

Federal Rules of Civil Procedure Rule 65

Rule 65. Injunctions

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is

irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance;

shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

(f) Copyright Impoundment. This rule applies to copyright impoundment proceedings.

Federal Rules of Civil Procedure Rule 71A

Rule 71A. Condemnation of Property

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) Joinder of Properties. The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) Complaint.

(1) Caption. The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) Contents. The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest

in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) **Filing.** In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) **Process.**

(1) **Notice; Delivery.** Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) **Same; Form.** Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of the defendant's property sufficient for its identification, the interest to be

taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where the attorney may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) **Service of Notice.**

(A) Personal Service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4 upon a defendant whose residence is known and who resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States.

(B) Service by Publication. Upon the filing of a certificate of the plaintiffs attorney stating that the attorney believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed the defendant's place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if

there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners." Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(4) Return; Amendment. Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4.

(e) Appearance or Answer. If a defendant has no objection or defense to the taking of the defendant's property, the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of the property, the defendant shall serve an answer within 20 days after the service of notice upon the defendant. The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the interest claimed, and state all the defendant's objections and

defenses to the taking of the property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not the defendant has previously appeared or answered, the defendant may present evidence as to the amount of the compensation to be paid for the and the defendant may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) **Amendment of Pleadings.** Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment and shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve an answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) **Substitution of Parties.** If a defendant dies or becomes incompetent or transfers an interest after the defendant's joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d)(3) of this rule.

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not be permitted or required by the court to suggest nominees. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate. If a commission is appointed it shall have the authority of a master provided in Rule 53(c) and proceedings before it shall be governed by the provisions of Rule 53(d). Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the

practice, prescribed in Rule 53(e), (f), and (g). Trial of all issues shall otherwise be by the court.

(i) **Dismissal of Action.**

(1) As of Right. If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) By Stipulation. Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) By Order of the Court. At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) Effect. Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) **Deposit and its Distribution.** The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to that defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to that defendant, the court shall enter judgment against that defendant and in favor of the plaintiff for the overpayment.

(k) **Condemnation Under a State's Power of Eminent Domain.** The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

(i) **Costs.** Costs are not subject to Rule 54(d).